Tenaga Nasional Bhd v Transformer Repairs & Services Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-1872–10 OF 2021
VAZEER ALAM MYDIN, GUNALAN MUNIANDY AND WONG KIAN KHEONG JJCA
7 NOVEMBER 2023

Civil Procedure — Writ of seizure and sale — Movable property — Plaintiff sought declaration that plaintiff was lawful owner of movable property — Plaintiff entered contract with third party for the supply, erect and commission of movable property — Movable property was in possession of execution debtor — Movable property were seized and sold by way of public auction — Whether plaintiff's equitable ownership of movable property established — Whether execution creditor could lawfully seize and sell movable property in possession of execution debtor pursuant to writ of seizure and sale when movable property did not belong in equity to execution debtor — Whether court's decision on lawfulness of writ of seizure and sale and public auction bound non-parties — Whether plaintiff's claim for ownership of movable property barred by plaintiff's inaction and delay in claiming movable property, laches, acquiescence, waiver, estoppel and/or abandonment — Whether execution creditor could rely on equitable estoppel doctrine — Whether plaintiff should have filed interpleader proceedings in execution creditor's suit under O 17 r 2 of the Rules of Court 2012 to claim return of movable property — Whether court could order return of movable property to plaintiff — Whether plaintiff should have cited third party as co-defendant — Whether High Court should grant declarations under s 41 of Specific Relief Act 1950 — Whether plaintiffs could filed action premised on tort of conversion, tort of negligence and unjust enrichment — Rules of Court 2012 O 1 r 7, O 1A, O 2 r 1(2), O 15 r 6(1), O 15 r 6(2)(b)(i), O15 r 6(2)(b)(ii), O 17 r 2 & O 45 r 12(1) — Specific Relief Act 1950 ss 9 & 41

The present appeal discussed the important issue of whether an execution creditor could lawfully seize and sell movable property in the possession of an execution debtor pursuant to a writ of seizure and sale issued by the court when the movable property did not belong in equity to the execution debtor ('the main issue'). The relevant facts were as follow: The plaintiff had executed a contract ('the contract') with Zanwa Sdn Bhd ('Zanwa') whereby under the contract, Zanwa was to supply, erect and commission two units of power transformers ('the power transformers') on a land owned by Zanwa ('the land'). Even though payment had been made by the plaintiff, Zanwa had failed to complete the contract. The land was eventually sold to the second defendant. The first defendant then rented the land (via a tenancy agreement ('the tenancy

agreement')) from the second defendant. The first defendant allowed Zanwa to continue with the execution of the contract, but Zanwa still failed to complete the contract. Another problem arose when the first defendant failed to pay the relevant rent to the second defendant which led to the filing of a suit by the second defendant ('the second defendant's suit') against the first defendant for breach of the tenancy agreement. The second defendant then obtained summary judgment ('the summary judgment') in relation to the said suit. Premised on this summary judgment, the second defendant applied and subsequently obtained a writ of seizure and sale ('WSS') of all movable properties on the said land. There was also an application by an individual known as Pn Wan for a declaration that the seized movable properties except for the power transformers were owned by her and she had also affirmed an affidavit ('Pn Wan's affidavit') stating that the power transformers were owned by the plaintiff, but the application was dismissed by the sessions court. The seized movable properties including the power transformers were then sold by the bailiff by way of public auction ('judicial auction') to the third defendant for a sum of RM216,000 ('the sale proceeds'). The first defendant's application to set aside the WSS and the judicial auction was allowed by the sessions court but on appeal by the third defendant, the Klang High Court reversed the sessions court's decision ('Klang HC's decision (third defendant's appeal)'). It ought to be noted that Zanwa had concealed ('Zanwa's concealment') and deceived ('Zanwa's deception') the plaintiff in relation to the following relevant facts: (a) the sale of the land to the second defendant by way of public auction; (b) the tenancy agreement between the first and second defendants; (c) the winding-up of Zanwa; and (d) the judicial auction of the power transformers. Further, the first defendant had concealed ('the first defendant's concealment') the following relevant facts from the plaintiff: (i) the tenancy agreement; (ii) the second defendant's suit; and (iii) the summary judgment. The plaintiff then filed the amended originating summons ('the amended OS') in the High Court for, inter alia: (1) a declaration that the plaintiff was the lawful and beneficial owner of the power transformers and that the seizure and sale of the power transformers pursuant to the WSS and the judicial auction were invalid and void; (2) an order for the return of the power transformers to the plaintiff; and (3) damages based on the tort of conversion, tort of negligence, and unjust enrichment ('the three causes of action'). The plaintiff's application was dismissed ('the HC's decision'), hence, the present appeal. The issues to be determined in the present appeal were: (A) whether the plaintiff had discharged the legal burden to prove the plaintiff's equitable ownership of the power transformers; (B) whether the bailiff's seizure of the power transformers and the judicial auction of the power transformers were valid; (C) whether the learned High Court judge could rely on the Klang HC's decision (third defendant's appeal) which decided that the execution of the WSS and the judicial auction was lawful when the plaintiff was not a party to the action and when the plaintiff was not given a right to be heard regarding the plaintiff's equitable ownership of the power transformers; (D) whether the plaintiff was

barred by the plaintiff's inaction and delay in claiming the power transformers ('the alleged plaintiff's inaction'), laches, acquiescence, waiver, estoppel and/or abandonment; (E) whether the second defendant could rely on equitable estoppel doctrine; (F) whether the plaintiff should have filed interpleader proceedings in the second defendant's suit under O 17 r 2 of the Rules of Court 2012 ('the ROC') to claim the return of the power transformers ('the interpleader proceedings'); (G) whether the court could order the return of the power transformers to the plaintiff; (H) whether the plaintiff should have cited Zanwa as a co-defendant in the amended OS; (I) whether the High Court should grant declarations under s 41 of the Specific Relief Act 1950 ('the SRA'); and (J) whether the plaintiff's three causes of action should be allowed.

Held, allowing the appeal with costs of RM30,000 to be paid by the second defendant to the plaintiff:

(1) It was not disputed that at the time of the bailiff's seizure of the power transformers, the power transformers were in the possession of the execution debtor, ie, the first defendant, as such, the legal burden was on the plaintiff to prove the plaintiff's equitable ownership of the power transformers on a balance of probabilities. The court was of the view that the learned High Court judge committed a plain error of fact in failing to decide that the plaintiff had proven its equitable ownership of the power transformers. In this regard, the contents of the contract, the plaintiff's purchase orders and Zanwa's invoices in relation to the power transformers were not disputed. There was also no evidence adduced by the defendants to rebut the contents of the contract, the purchase orders, and the invoices. In fact, the plaintiff's equitable ownership of the power transformers was admitted in the first defendant's affidavit (see paras 54–55).

(2) Order 45 r 12(1) of the ROC had expressly provided that a WSS for movable property 'shall' be in Form 84. It was clear from Form 84 that the sheriff and bailiff could only lawfully seize and sell movable property pursuant to a WSS when the movable property belonged in equity to the execution debtor. Accordingly, to answer the main issue, if movable property belonged in equity to a third party, the sheriff and bailiff could not lawfully seize and sell the movable property under the WSS. If the sheriff and bailiff could lawfully seize and sell movable asset in the possession of execution debtor which belonged in equity to a third party under the WSS, such a legal position was contrary to the wording of Form 84 read with O 1 r 7 and O 45 r 12(1) of the ROC. In view of the plaintiff's equitable ownership of the power transformers and the resolution of the main issue, the learned High Court judge should have decided that the bailiff's seizure of the power transformers and the judicial auction of the transformers were invalid (see paras 57–58).

(3) Our highest courts in the cases of *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303, and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 had decided that a decision, judgment and order did not bind a party if the party had been deprived of his or her right to be heard before the decision/judgment/order was made. Therefore, the learned High Court judge's reliance on the Klang HC's decision (third defendant's appeal) to support the HC's decision constituted an error of law (see para 59).

(4) The learned High Court judge had made a plain error of fact when His Lordship did not consider the following pertinent matters: (a) due to Zanwa's concealment, Zanwa's deception and the first defendant's concealment, the plaintiff could not have actual knowledge of all the relevant facts of this case; (b) there was no evidence in this case to prove that the plaintiff was willfully blind to the relevant facts which were obvious; and (c) the plaintiff was entitled to insist that Zanwa performed all obligations under the contract especially when the plaintiff had made the relevant payment in relation to the contract to Zanwa. In view of Zanwa's concealment, Zanwa's deception and the first defendant's concealment, the learned High Court judge should not have relied on the alleged plaintiff's inaction. Consequently, the learned High Court judge erred in law and fact in deciding that the amended OS was barred by laches, acquiescence, waiver, estoppel and/or abandonment (see paras 65 & 67).

(5) With regard to the application of the equitable estoppel doctrine, by way of Pn Wan's affidavit, the second defendant had been expressly informed of the plaintiff's equitable ownership of the power transformers before the judicial auction of the same. The second defendant did not however inquire from the plaintiff regarding the ownership of the power transformers. Worse still, the second defendant proceeded with the judicial auction. Due to such an inequitable conduct on the part of the second defendant, the learned High Court judge should not have applied the equitable estoppel doctrine in this case (see para 68).

(6) The learned High Court judge should have considered the plaintiff's efforts in deciding whether the plaintiff was barred by laches, acquiescence, waiver, estoppel and/or abandonment. In this regard, the plaintiff had taken the following actions over a period of less than two months (before the filing of the OS): (a) sending letters to the solicitors of the first and second defendants demanding the return of the power transformers; and (b) appointing solicitors to act in this case whereby the solicitors had to conduct file searches to ascertain the latest status of the second defendant's suit, gather evidence in support of the amended OS, and draft the cause papers in the amended OS. In the High Court's case of *Ling Tiew Hoe v Public Finance Bhd* [1997] MLJU 256, Tee Ah Sing J

(as he then was) held that a period of five months for a registered co-proprietor of one-fifth undivided share in land to apply to court to set aside the sale of the land by public auction to a purchaser (on the ground that the co-proprietor had not been given notice of the public auction), was not a bar for the court to set aside the sale and subsequent registration of the land in favour of the purchaser (see para 69).

(7) The learned High Court judge erred in law in holding that the plaintiff should have filed the interpleader proceedings. In the amended OS, the plaintiff was not merely applying for the return of the power transformers, but the plaintiff had also claimed damages from the defendants based on the three causes of action. Premised on the case of *Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor* [2013] 4 MLJ 313, the plaintiff could not have filed the interpleader proceedings in the second defendant's suit because the plaintiff's three causes of action had to be decided in a fresh action (as in the amended OS) (see para 70).

(8) Upon proof of the plaintiff's equitable ownership of the power transformers, the court was of the view that the learned High Court judge should have made a restitution order under s 9 of the SRA, ie, an order for the return of the power transformers to the plaintiff. Section 9 of the SRA provided for a statutory remedy. Accordingly, the plaintiff was not required to prove the plaintiff's three causes of action as a condition precedent for the High Court to make a restitution order. As per the court's decision above, the seizure and judicial auction of the power transformers were invalid, consequently: (a) the third defendant could not have obtained any legal or equitable ownership of the power transformers; and (b) the restitution order should have been made in this case notwithstanding the fact that the third defendant was a bona fide purchaser of the power transformers for valuable consideration without any actual notice of the plaintiff's equitable ownership of the power transformers (see paras 72–74).

(9) The plaintiff was the beneficial owner of the power transformers, as such, there was no reason for the plaintiff to cite Zanwa as a co-defendant in the amended OS. Further, even if Zanwa had applied to be joined as co-defendant, such an application should not be allowed because in view of proof of the plaintiff's equitable ownership of the power transformers: (a) it was not necessary to join Zanwa under O 15 r 6(2)(b)(i) of the ROC as a party so as to ensure that all matters in dispute in the amended OS could be completely determined; and (b) Zanwa could not rely on O 15 r 6(2)(b)(ii) of the ROC as there did not exist any question between Zanwa and any party in the amended OS for which it would be just and convenient for the High Court to determine. Further, O 1A and O 2 r 1(2) of the ROC required the court to apply the ROC with regard to the

'overriding interest of justice and not only to the technical non-compliance with' the ROC. According to O 15 r 6(1) of the ROC, the amended OS 'shall not be defeated by reason of the … non-joinder' of Zanwa and the High Court may determine the issues in dispute so far as they affect the rights and interests of all the parties in this case (see para 76).

(10) The learned High Court judge erred when His Lordship refused to exercise his discretion under s 41 of the SRA because: (a) as explained above, the alleged plaintiff's inaction did not exist, as such, there was no room for the High Court to rely on laches, acquiescence, waiver, estoppel and/or abandonment in this case; (b) the learned High Court judge had committed an error of law in deciding that the plaintiff should have filed the interpleader proceedings; and (c) proviso to s 41 of the SRA only applicable when a party merely applied for a declaratory order and nothing else, but in the present case, in addition to an application for declarations, the amended OS had also sought for the return of the power transformers and damages for the plaintiff's three causes of action (see para 79).

(11) The second defendant could not be liable to the plaintiff for the tort of negligence because the second defendant owed no duty of care to the plaintiff in respect of the power transformers. This was because there was no 'sufficient legal proximity' between the plaintiff and the second defendant with regard to the power transformers. There was also no physical proximity, circumstantial proximity, and causal proximity (see para 81).

(12) Based on the evidence, the court found that at the time of the judicial auction, the plaintiff had a right to immediate possession of the power transformers, consequently, the plaintiff had the right to sue the first and second defendants for the tort of conversion regarding the power transformers. The court found that by way of the seizure and judicial auction of the power transformers, the second defendant had committed the tort of conversion of the power transformers against the plaintiff. As the first defendant was not involved in the said seizure and judicial auction, the first defendant was not liable to the plaintiff for the tort of conversion. Notwithstanding the second defendant's conversion of the power transformers, the court refused to award any damages to the plaintiff because the plaintiff had not suffered any loss due to the said conversion because: (a) the plaintiff could not use the power transformers; and (b) the court had granted the restitution order which was an adequate remedy for the plaintiff in this case (see paras 85–87).

(13) In this case, the plaintiff's unjust enrichment claim against the third defendant could not succeed because the third defendant had not been enriched in respect of the power transformers. On the contrary, the third

defendant had purchased the power transformers at the judicial auction and paid the sale proceeds. Further, the third defendant's loss (in relation to the cost of employing security guards on the land and the fact that the third defendant could not use the power transformers even though the third defendant had paid the sale proceeds) had been incurred and was still being incurred (see para 89).

(14) The court acknowledged that the third defendant's loss had occurred due to the court's decision in this appeal. As the second defendant had committed an abuse of court process regarding the judicial auction, the third defendant had a right to claim from the second defendant for the third defendant's loss based on the tort of abuse of court process (see para 95).

[Bahasa Malaysia summary

Rayuan semasa membincangkan isu penting sama ada pemiutang pelaksanaan boleh menyita dan menjual harta alih secara sah dalam milikan penghutang pelaksanaan menurut writ penyitaan dan penjualan yang dikeluarkan oleh mahkamah sedangkan harta alih tersebut bukan milik penghutang pelaksanaan dalam ekuiti ('isu utama'). Fakta yang berkaitan adalah seperti berikut: Plaintif telah memasuki kontrak ('kontrak tersebut') dengan Zanwa Sdn Bhd ('Zanwa') di mana di bawah kontrak tersebut, Zanwa akan membekal, mendirikan dan mengendalikan dua unit pengubah kuasa ('pengubah kuasa tersebut') di atas tanah milik Zanwa ('tanah tersebut'). Walaupun bayaran telah dibuat oleh plaintif, Zanwa gagal menyempurnakan kontrak tersebut. Tanah tersebut akhirnya dijual kepada defendan kedua. Defendan pertama kemudiannya menyewa tanah tersebut (melalui perjanjian penyewaan ('perjanjian penyewaan tersebut')) daripada defendan kedua. Defendan pertama membenarkan Zanwa meneruskan pelaksanaan kontrak tersebut, tetapi Zanwa masih gagal menyempurnakan kontrak tersebut. Masalah lain timbul apabila defendan pertama gagal membayar sewa kepada defendan kedua yang membawa kepada pemfailan saman oleh defendan kedua ('saman defendan kedua') terhadap defendan pertama kerana melanggar perjanjian penyewaan tersebut. Defendan kedua kemudiannya memperoleh penghakiman terus ('penghakiman terus tersebut') berhubung dengan saman tersebut. Berdasarkan penghakiman terus ini, defendan kedua memohon dan seterusnya memperoleh writ penyitaan dan penjualan ('WSS') bagi semua harta alih di atas tanah tersebut. Terdapat juga permohonan oleh seorang individu yang dikenali sebagai Pn Wan untuk pengisytiharan bahawa harta alih yang dirampas kecuali pengubah kuasa tersebut adalah miliknya dan dia juga telah mengesahkan afidavit ('afidavit Pn Wan') yang menyatakan bahawa pengubah kuasa tersebut dimiliki oleh plaintif, tetapi permohonan tersebut ditolak oleh mahkamah sesyen. Harta alih yang dirampas termasuk pengubah kuasa tersebut kemudiannya dijual oleh bailif melalui lelongan awam ('lelong kehakiman') kepada defendan ketiga dengan nilai RM216,000 ('hasil jualan

tersebut'). Permohonan defendan pertama untuk mengenepikan WSS dan lelongan kehakiman tersebut dibenarkan oleh mahkamah sesyen tetapi atas rayuan oleh defendan ketiga, Mahkamah Tinggi Klang telah mengubah keputusan mahkamah sesyen ('keputusan MT Klang (rayuan defendan ketiga)'). Perlu diingat bahawa Zanwa telah merahsiakan ('perahsiaan oleh Zanwa') dan memperdayakan ('pemerdayaan oleh Zanwa') plaintif berhubung dengan fakta-fakta berikut: (a) penjualan tanah tersebut kepada defendan kedua melalui lelongan awam; (b) perjanjian penyewaan antara defendan pertama dan kedua; (c) penggulungan Zanwa; dan (d) lelongan kehakiman pengubah kuasa tersebut. Selanjutnya, defendan pertama telah merahsiakan ('perahsiaan oleh defendan pertama') fakta-fakta berikut daripada plaintif: (i) perjanjian penyewaan tersebut; (ii) saman defendan kedua; dan (iii) penghakiman terus tersebut. Plaintif kemudiannya memfailkan saman pemula yang dipinda ('SP yang dipinda') di Mahkamah Tinggi untuk memohon, antara lain: (1) pengisytiharan bahawa plaintif adalah pemilik sah dan benefisial pengubah kuasa tersebut dan bahawa penyitaan dan penjualan pengubah kuasa melalui WSS dan lelongan kehakiman tersebut adalah tidak sah dan terbatal; (2) suatu perintah untuk mengembalikan pengubah kuasa tersebut kepada plaintif; dan (3) ganti rugi berdasarkan tort penukaran, tort kecuaian, dan pengayaan yang tidak adil ('tiga kausa tindakan tersebut'). Permohonan plaintif telah ditolak ('keputusan MT tersebut'), oleh itu, rayuan semasa. Isu-isu yang perlu ditentukan dalam rayuan ini ialah: (A) sama ada plaintif telah melepaskan beban undang-undang untuk membuktikan pemilikan saksama plaintif terhadap pengubah kuasa tersebut; (B) sama ada penyitaan oleh bailif terhadap pengubah kuasa tersebut dan lelongan kehakiman pengubah kuasa tersebut adalah sah; (C) sama ada hakim Mahkamah Tinggi yang bijaksana boleh bergantung kepada keputusan MT Klang (rayuan defendan ketiga) yang memutuskan bahawa pelaksanaan WSS dan lelongan kehakiman tersebut adalah sah sedangkan plaintif bukan pihak dalam tindakan tersebut dan plaintif telah tidak diberi hak untuk didengar mengenai pemilikan saksama plaintif terhadap pengubah kuasa tersebut; (D) sama ada plaintif dihalang oleh kegagalan plaintif untuk bertindak dan kelewatan plaintif dalam menuntut pengubah kuasa tersebut ('kegagalan plaintif untuk bertindak'), kelengahan, akuiesens, penepian, estopel dan/atau peninggalan; (E) sama ada defendan kedua boleh bergantung pada doktrin estopel yang saksama; (F) sama ada plaintif sepatutnya memfailkan prosiding interplider dalam saman defendan kedua di bawah A 17 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk menuntut pemulangan pengubah kuasa tersebut ('prosiding interplider tersebut'); (G) sama ada mahkamah boleh memerintahkan pemulangan pengubah kuasa tersebut kepada plaintif; (H) sama ada plaintif sepatutnya memasukkan Zanwa sebagai defendan bersama dalam SP yang dipinda; (I) sama ada Mahkamah Tinggi sepatutnya memberikan pengisytiharan di bawah s 41 Akta Relief Spesifik 1950 ('ARS'); dan (J) sama ada tiga kausa tindakan plaintif tersebut patut dibenarkan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000 dibayar oleh defendan kedua kepada plaintif:

(1) Tidak dipertikaikan bahawa pada masa penyitaan pengubah kuasa tersebut oleh bailif, pengubah kuasa tersebut berada dalam milikan penghutang pelaksanaan, iaitu, defendan pertama, oleh itu, beban undang-undang terletak pada plaintif untuk membuktikan pemilikan saksama plaintif terhadap pengubah kuasa tersebut di atas imbangan kebarangkalian. Mahkamah berpendapat bahawa hakim Mahkamah Tinggi yang bijaksana telah melakukan kesilapan fakta yang jelas apabila gagal memutuskan bahawa plaintif telah membuktikan pemilikan saksamanya ke atas pengubah kuasa tersebut. Dalam hal ini, kandungan kontrak, pesanan pembelian plaintif dan invois Zanwa berhubung dengan pengubah kuasa tersebut tidak dipertikaikan. Juga tiada keterangan dikemukakan oleh defendan-defendan untuk menyangkal kandungan kontrak, pesanan pembelian dan invois tersebut. Malah, pemilikan saksama plaintif terhadap pengubah kuasa tersebut telah diakui dalam afidavit defendan pertama (lihat perenggan 54–55).

(2) Aturan 45 k 12(1) KKM 2012 telah memperuntukkan dengan jelas bahawa WSS untuk harta alih 'hendaklah' dalam Borang 84. Jelas daripada Borang 84 bahawa syerif dan bailif hanya boleh menyita dan menjual harta alih secara sah melalui WSS apabila harta alih tersebut adalah milik penghutang pelaksanaan dalam ekuiti. Oleh itu, untuk menjawab isu utama, jika harta alih dimiliki secara ekuiti oleh pihak ketiga, syerif dan bailif tidak boleh menyita dan menjual harta alih secara sah di bawah WSS. Jika syerif dan bailif boleh secara sah menyita dan menjual harta alih dalam milikan penghutang pelaksanaan yang dimiliki secara ekuiti oleh pihak ketiga di bawah WSS, kedudukan undang-undang tersebut adalah bertentangan dengan perkataan yang terdapat dalam Borang 84 yang dibaca bersama A 1 k 7 dan A 45 k 12(1) KKM 2012. Mengambil kira pemilikan saksama plaintif terhadap pengubah kuasa tersebut dan penyelesaian isu utama tersebut, hakim Mahkamah Tinggi yang bijaksana sepatutnya memutuskan bahawa penyitaan oleh bailif terhadap pengubah kuasa tersebut dan lelongan kehakiman pengubah kuasa tersebut adalah tidak sah (lihat perenggan 57–58).

(3) Mahkamah-mahkamah tertinggi kita dalam kes *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303, dan kes *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 telah memutuskan bahawa sesuatu keputusan, penghakiman dan perintah tidak mengikat sesuatu pihak sekiranya pihak tersebut telah dilucutkan haknya untuk didengar sebelum keputusan/penghakiman/perintah tersebut dibuat. Oleh itu, pergantungan hakim Mahkamah Tinggi yang bijaksana terhadap keputusan MT Klang (rayuan defendan ketiga) untuk

menyokong keputusan MT tersebut merupakan satu kekhilafan undang-undang (lihat perenggan 59).

(4) Hakim Mahkamah Tinggi yang bijaksana telah membuat kesilapan fakta yang nyata apabila Yang Arif tidak mempertimbangkan perkara-perkara penting berikut: (a) disebabkan oleh perahsiaan oleh Zanwa, pemerdayaan oleh Zanwa dan perahsiaan oleh defendan pertama, plaintif tidak dapat mengetahui semua fakta relevan dalam kes ini; (b) tiada keterangan dalam kes ini untuk membuktikan bahawa plaintif dengan sengaja membutakan mata terhadap fakta relevan yang jelas; dan (c) plaintif berhak untuk menegaskan agar Zanwa melaksanakan semua kewajipan di bawah kontrak tersebut terutamanya apabila plaintif telah membuat pembayaran yang berkaitan berhubung dengan kontrak tersebut kepada Zanwa. Mengambil kira perahsiaan oleh Zanwa, pemerdayaan oleh Zanwa dan perahsiaan oleh defendan pertama, hakim Mahkamah Tinggi yang bijaksana tidak sepatutnya bergantung kepada kegagalan plaintif untuk bertindak. Akibatnya, hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa SP yang dipinda tersebut telah dihalang oleh kelengahan, akuiesens, penepian, estopel dan/atau peninggalan (lihat perenggan 65 & 67).

(5) Berkenaan dengan penggunaan doktrin estopel yang saksama, melalui afidavit Pn Wan, defendan kedua telah dimaklumkan dengan jelas mengenai pemilikan saksama plaintif terhadap pengubah kuasa tersebut sebelum lelongan kehakiman dijalankan. Defendan kedua bagaimanapun tidak bertanya kepada plaintif berhubung pemilikan pengubah kuasa tersebut. Lebih teruk lagi, defendan kedua meneruskan lelongan kehakiman tersebut. Disebabkan oleh kelakuan tidak saksama tersebut di pihak defendan kedua, hakim Mahkamah Tinggi yang bijaksana tidak sepatutnya mengguna pakai doktrin estopel yang saksama dalam kes ini (lihat perenggan 68).

(6) Hakim Mahkamah Tinggi yang bijaksana sepatutnya mempertimbangkan usaha plaintif dalam memutuskan sama ada plaintif telah dihalang oleh kelengahan, akuiesens, penepian, estopel dan/atau peninggalan. Dalam hal ini, plaintif telah mengambil tindakan-tindakan berikut dalam tempoh kurang daripada dua bulan (sebelum pemfailan SP tersebut): (a) menghantar surat kepada peguam cara defendan pertama dan kedua bagi menuntut pemulangan pengubah kuasa tersebut; dan (b) melantik peguam cara untuk bertindak dalam kes ini di mana peguam cara perlu menjalankan carian fail untuk memastikan status terkini saman defendan kedua, mengumpul keterangan untuk menyokong SP yang dipinda, dan merangka kertas kausa dalam SP yang dipinda. Dalam kes Mahkamah Tinggi *Ling Tiew Hoe v Public Finance Bhd* [1997] MLJU 256, Tee Ah Sing H (beliau pada ketika itu)

memutuskan bahawa tempoh lima bulan yang diambil oleh pemilik bersama berdaftar bagi satu perlima bahagian tanah yang tidak dibahagikan untuk memohon kepada mahkamah untuk mengenepikan penjualan tanah melalui lelongan awam kepada pembeli (atas alasan pemilik bersama tidak diberi notis mengenai lelongan awam), bukanlah satu halangan bagi mahkamah untuk mengenepikan penjualan dan seterusnya pendaftaran tanah tersebut memihak kepada pembeli (lihat perenggan 69).

(7) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang apabila berpendapat bahawa plaintif sepatutnya memfailkan prosiding interplider. Dalam SP yang dipinda, plaintif bukan sahaja memohon pemulangan pengubah kuasa tersebut, tetapi plaintif juga telah menuntut ganti rugi daripada defendan-defendan berdasarkan tiga kausa tindakan tersebut. Berdasarkan kes *Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor* [2013] 4 MLJ 313, plaintif tidak boleh memfailkan prosiding interplider dalam saman defendan kedua kerana tiga kausa tindakan plaintif tersebut perlu diputuskan dalam tindakan baharu (seperti dalam SP yang dipinda) (lihat perenggan 70).

(8) Setelah pembuktian pemilikan saksama plaintif ke atas pengubah kuasa tersebut, mahkamah berpendapat bahawa hakim Mahkamah Tinggi yang bijaksana sepatutnya membuat perintah pengembalian di bawah s 9 ARS, iaitu perintah untuk mengembalikan pengubah kuasa tersebut kepada plaintif. Seksyen 9 ARS memperuntukkan remedi berkanun. Sehubungan itu, plaintif tidak perlu membuktikan tiga kausa tindakan plaintif tersebut sebagai syarat duluan untuk Mahkamah Tinggi membuat perintah pengembalian. Seperti yang diputuskan oleh mahkamah di atas, penyitaan dan lelongan kehakiman pengubah kuasa tersebut adalah tidak sah, akibatnya: (a) defendan ketiga tidak boleh memperoleh apa-apa pemilikan yang sah atau saksama bagi pengubah kuasa tersebut; dan (b) perintah pengembalian sepatutnya dibuat dalam kes ini tanpa mengira fakta bahawa defendan ketiga adalah pembeli bona fide pengubah kuasa tersebut untuk balasan yang bernilai tanpa apa-apa notis sebenar mengenai pemilikan saksama plaintif terhadap pengubah kuasa tersebut (lihat perenggan 72–74).

(9) Plaintif adalah pemilik benefisial pengubah kuasa tersebut, oleh itu, tiada sebab untuk plaintif memasukkan Zanwa sebagai defendan bersama dalam SP yang dipinda. Seterusnya, andai kata Zanwa memohon untuk disertakan sebagai defendan bersama, permohonan sedemikian tidak seharusnya dibenarkan kerana mengambil kira pembuktian pemilikan saksama plaintif terhadap pengubah kuasa tersebut: (a) adalah tidak perlu untuk mencantumkan Zanwa di bawah A 15 k 6(2)(b)(i) KKM 2012 sebagai satu pihak untuk memastikan segala perkara yang dipertikaikan

dalam SP yang dipinda dapat diputuskan dengan selengkapnya; dan (b) Zanwa tidak boleh bergantung pada A 15 k 6(2)(b)(ii) KKM 2012 kerana tidak wujud apa-apa persoalan antara Zanwa dan mana-mana pihak dalam SP yang dipinda tersebut yang mana ia adalah adil dan sesuai untuk Mahkamah Tinggi putuskan. Selanjutnya, A 1A dan A 2 k 1(2) KKM 2012 memperuntukkan agar mahkamah untuk menggunakan KKM 2012 berkenaan dengan 'kepentingan utama keadilan dan tidak hanya kepada ketidakpatuhan teknikal dengan' KKM 2012. Menurut A 15 k 6(1) KKM 2012, SP yang dipinda tersebut 'tidak boleh dikecewakan semata-mata oleh sebab ... ketidakcantuman' Zanwa dan Mahkamah Tinggi boleh menentukan isu-isu yang dipertikaikan setakat mana ia menjejaskan hak dan kepentingan semua pihak dalam kes ini (lihat perenggan 76).

(10) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf apabila Yang Arif enggan menggunakan budi bicaranya di bawah s 41 ARS kerana: (a) seperti yang dijelaskan di atas, tidak terdapat kegagalan di pihak plaintif untuk bertindak, oleh itu, tiada ruang untuk Mahkamah Tinggi untuk bergantung pada kelengahan, akuiesens, penepian, estopel dan/atau peninggalan dalam kes ini; (b) hakim Mahkamah Tinggi yang bijaksana telah melakukan kekhilafan undang-undang dalam memutuskan bahawa plaintif sepatutnya memfailkan prosiding interplider; dan (c) proviso kepada s 41 ARS hanya terpakai apabila sesuatu pihak memohon perintah pengisytiharan sahaja dan tiada yang lain, tetapi dalam kes ini, sebagai tambahan kepada permohonan untuk pengisytiharan, SP yang dipinda tersebut juga telah memohon pemulangan pengubah kuasa tersebut dan ganti rugi bagi tiga kausa tindakan plaintif tersebut (lihat perenggan 79).

(11) Defendan kedua tidak boleh bertanggungjawab kepada plaintif untuk tort kecuaian kerana defendan kedua tidak mempunyai kewajipan berjaga-jaga kepada plaintif berkenaan dengan pengubah kuasa tersebut. Ini kerana tiada 'kedekatan undang-undang yang mencukupi' antara plaintif dan defendan kedua berkenaan dengan pengubah kuasa tersebut. Selain itu, tidak terdapat juga kedekatan fizikal, kedekatan keadaan, dan kedekatan sebab (lihat perenggan 81).

(12) Berdasarkan keterangan, mahkamah mendapati bahawa pada masa lelongan kehakiman dijalankan, plaintif mempunyai hak untuk pemilikan segera pengubah kuasa tersebut, oleh itu, plaintif mempunyai hak untuk menyaman defendan pertama dan kedua untuk tort penukaran mengenai pengubah kuasa tersebut. Mahkamah mendapati bahawa melalui penyitaan dan lelongan kehakiman pengubah kuasa tersebut, defendan kedua telah melakukan tort penukaran pengubah kuasa tersebut terhadap plaintif. Oleh kerana defendan pertama tidak terlibat dalam penyitaan dan lelongan kehakiman tersebut, defendan

pertama tidak bertanggungjawab kepada plaintif untuk tort penukaran. Walaupun penukaran pengubah kuasa tersebut telah dilakukan oleh defendan kedua, mahkamah enggan memberikan apa-apa ganti rugi kepada plaintif kerana plaintif tidak mengalami apa-apa kerugian akibat penukaran tersebut kerana: (a) plaintif tidak boleh menggunakan pengubah kuasa tersebut; dan (b) mahkamah telah memberikan perintah pengembalian yang merupakan remedi yang mencukupi untuk plaintif dalam kes ini (lihat perenggan 85–87).

(13) Dalam kes ini, tuntutan pengayaan yang tidak adil oleh plaintif terhadap defendan ketiga tidak dibuktikan kerana defendan ketiga tidak diperkayakan melalui pengubah kuasa tersebut. Sebaliknya, defendan ketiga telah membeli pengubah kuasa tersebut ketika lelongan kehakiman dan membayar hasil jualan tersebut. Selanjutnya, kerugian defendan ketiga (berkaitan dengan kos menggaji pengawal keselamatan di atas tanah tersebut dan fakta bahawa defendan ketiga tidak boleh menggunakan pengubah kuasa tersebut walaupun defendan ketiga telah membayar hasil jualan tersebut) telah ditanggung dan masih ditanggung (lihat perenggan 89).

(14) Mahkamah mengakui bahawa kerugian defendan ketiga telah berlaku disebabkan keputusan mahkamah dalam rayuan ini. Oleh kerana defendan kedua telah melakukan penyalahgunaan proses mahkamah berhubung lelongan kehakiman tersebut, defendan ketiga mempunyai hak untuk menuntut daripada defendan kedua bagi kerugian defendan ketiga berdasarkan tort penyalahgunaan proses mahkamah (lihat perenggan 95).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Development & Commercial Bank Bhd v Lam Chuan Company & Anor [1989] 1 MLJ 318, HC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Ktl Sdn Bhd v Leong Oow Lai [2014] MLJU 1405, HC (refd)
Lilies Suraya bt Abdul Latib & Ors v Khairul bin Sabri & Others [2020] 4 AMR 365 (refd)
Lim Ker v Chew Seok Tee [1967] 2 MLJ 253, FC (distd)
Ling Tiew Hoe v Public Finance Bhd [1997] MLJU 256, HC (refd)
Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734; [2015] 7 CLJ 1008, FC (refd)
MCC Proceeds Inc v Lehman Bros International (Europe) [1998] 4 All ER 675, CA (folld)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 CLJ 340, CA (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (folld)

Ng Boo Bee v Khaw Joo Choe [1921] 1 LNS 8, SC (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor [2013] 4 MLJ 313; [2013] 5 CLJ 161, FC (refd)
Toh Seow Ngan & Ors v Toh Seak Keng & Ors [1990] 2 MLJ 303, SC (refd)
Whitworth v Gaugain (1846) 41 ER 809, HC (refd)

Legislation referred to

Companies Act 2016 ss 486(1)(a), 516(1), (2), Twelfth Schedule, Part I, para (d)
Evidence Act 1950 ss 3, 56, 57, 57(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i), (1)(j), (1)(k), (1)(l), (1)(m), (1)(n), (1)(o), 58, 101(1), (2), 102, 106, 114(e)
Rules of Court 2012 O 1 rr 4(1), 7, O 1A, O 2 r 1(2), O 15 r 6(1), (2)(b)(i), (2)(b)(ii), O 17 rr 1(1), 1(1)(b), 2, 5, 5(1), O 45 r 12, 12(1), Appendix A, Form 84
Specific Relief Act 1950 ss 9, 41

Steven Thiru (with David Ng Yew Kiat and Leah Samuel) (Steven Thiru & Sudhar Partnership) for the appellant.
Arifah bt Abd Aziz (Tengku Azlina, Rao, Low & Assoc) for the first respondent.
Mak Yin Wah (with Nur Astry Amami bt Agus Pemana) (Mak Haisha & Co) for the second respondent.
Phang Soon Mun (with Chew Chun Wei and Tang Kian Khuang) (Han & Partners) for the third respondent.

Wong Kian Kheong JCA:

A. INTRODUCTION

[1] This appeal discusses the main issue of whether an execution creditor can lawfully seize and sell movable property in the possession of an execution debtor pursuant to a writ of seizure and sale issued by the court ('WSS') when the movable property does not belong in equity to the execution debtor (main issue).

B. THE BACKGROUND

[2] We shall refer to parties as they were in the High Court ('HC').

[3] Zanwa Sdn Bhd ('Zanwa') owned a piece of land held under 'Pajakan Negeri No 24314, Lot No 87991, Mukim Kelang, Daerah Kelang, Selangor'

with a postal address at Lot No 41, Jalan Perigi Nenas 8/7, Pulau Indah Industrial Park (Phase 1), Westport, 42920 Port Klang, Selangor Darul Ehsan ('land').

[4] Zanwa used the land as a factory for its manufacturing and business operations.

[5] The Managing Director of Zanwa was Ir Zainal Abidin bin Hj Abdullah ('Ir Zainal').

[6] By way of a 'Letter of Acceptance' dated 18 April 2011, the plaintiff company ('plaintiff') awarded a contract to Zanwa (contract (plaintiff-Zanwa)) whereby Zanwa would supply, erect and commission two units of '90 MVA, 132/33 KV power transformers with Associated Ancillary Equipment for PMU 132/33 KV Setia Alam' (two power transformers) for the plaintiff at a price of RM9,320,000 (price (two power transformers)). The contract (plaintiff-Zanwa) was signed on 19 July 2011.

[7] With regard to the two power transformers:

(1) the two power transformers were supposed to be built by Zanwa on the land;

(2) the plaintiff had paid a total sum of RM8,106,491.34 to Zanwa ('plaintiff's payment (Zanwa)');

(3) notwithstanding the plaintiff's payment (Zanwa), Zanwa had breached the contract ('plaintiff-Zanwa') by not delivering the two power transformers to the plaintiff in accordance with the contract (plaintiff-Zanwa); and

(4) until the date of decision of this appeal, the two power transformers had been kept on the land.

[8] On 28 April 2017, there was a public auction of the land and the land was sold to the second defendant ('second defendant'). The second defendant did not however take possession of the land. Furthermore, the second defendant did not take any action regarding the two power transformers on the land.

[9] The first defendant company ('first defendant') had been incorporated pursuant to a 'Shareholders Agreement' which had been concluded by Zanwa and Magnitude power Sdn Bhd on 1 March 2018.

[10] On 29 July 2017, the first defendant entered into a tenancy agreement with the second defendant for a period of two years from 1 September 2017–31 August 2019 (tenancy agreement (first defendant-second defendant)). A

[11] The first defendant allowed Zanwa to continue its manufacturing and business operations on the land, including the completion of the two power transformers for the plaintiff. B

[12] Zanwa was wound up on 5 April 2019 by an order of HC in Kuala Lumpur (winding up court). The winding up court also appointed the official receiver to be Zanwa's liquidator. C

[13] On 11 July 2019: D

(1) Zanwa sent a letter to the plaintiff (Zanwa's letter (11 July 2019)) which stated as follows, among others:

   (a) Zanwa was 'in the process of closing down temporarily' as Zanwa's overheads were high and Zanwa was losing business; E

   (b) Zanwa was facing financial problems and would like to meet with the plaintiff to discuss about Zanwa's proposal to close down temporarily; and

   (c) Zanwa proposed to assign the 'balance' works under the contract (plaintiff-Zanwa) to a third party; F

(2) Ir Thevindra Raj a/l Selva Raj (Ir Thevindra), the plaintiff's project manager (Central-1) in the Grid Development Department, Grid Division, visited the land.

G

[14] On 14 August 2019, Zanwa sent a letter to the plaintiff (Zanwa's letter (14 August 2019)). According to Zanwa's letter (14 August 2019), among others:

(1) Zanwa had sold its factory to a third party and had to vacate the factory by 15 September 2019; H

(2) Zanwa was unable to 'continue' the contract (plaintiff-Zanwa); and

(3) the plaintiff was requested to collect the two power transformers by 15 September 2019. I

[15] The second defendant filed a suit in the sessions court (SC) of Klang against the first defendant on 26 August 2018 regarding the first defendant's breach of the tenancy agreement (first defendant-second defendant) ('second

defendant's suit (Klang SC)'). The second defendant's suit (Klang SC) claimed for, among others, the following remedies:

(1) an order for the first defendant to deliver vacant possession of the land to the second defendant; and

(2) double rental in a sum of RM72,000 per month shall be paid by the first defendant to the second defendant from 1 September 2019 until the date of delivery of vacant possession of the land by the first defendant to the second defendant.

[16] Zanwa sent a letter dated 26 September 2019 to the plaintiff which, among others, requested the plaintiff to collect the two power transformers 'as soon as possible as the insurance coverage' for the two power transformers had already expired ('Zanwa's letter (26 September 2019)').

[17] On 3 October 2019, Encik Sayaidina Hamzah bin Che Harun (Encik Sayaidina), a director of the first defendant, sent a 'WhatsApp' message to Ir Thevindra for the plaintiff to collect the two power transformers on an urgent basis (*pada kadar segera*) before the end of October 2019 ('first defendant's WhatsApp message (3 October 2019)'). According to first defendant's WhatsApp message (3 October 2019), among others:

(1) after October 2019, the two power transformers 'akan discrapkan'; and

(2) the first defendant needed to deliver vacant possession of the land on an urgent basis.

[18] A letter dated 10 October 2019 was sent by Zanwa to the plaintiff (Zanwa's letter (10 October 2019)) which stated as follows, among others:

(1) there were two break-ins at the factory on the land;

(2) the plaintiff was requested to collect the two power transformers 'soonest'; and

(3) Zanwa would not be responsible for the loss of the two power transformers.

[19] On 8 November 2019, Klang SC granted summary judgment in favour of the second defendant against the first defendant ('second defendant's summary judgment (Klang SC)'). The first defendant had appealed to Shah Alam HC against the second defendant's summary judgment (Klang SC) ('first defendant's HC appeal (second defendant's summary judgment)').

[20] On 19 November 2019, Puan Nor Amirawati from Zanwa sent an email to Ir Thevindra which informed the plaintiff, among others, that Zanwa had stopped operations (Zanwa's email (19 November 2019)).

[21] Premised on the second defendant's summary judgment (Klang SC), the second defendant applied to Klang SC and obtained a WSS dated 26 November 2019. The WSS stated as follows, among others (in our National Language):

> ...
>
> WRIT PENYITAAN DAN PENJUALAN (HARTA ALIH)
>
> Kepada:- Bailif
>
> Mahkamah Rendah
>
> Kelang
>
> Kami memerintahkan kamu supaya kamu menyebabkan dilevikan dan dibuat daripada harta yang kena disita di bawah suatu writ penyitaan dan penjualan yang hendaklah dikenalpastikan oleh atau bagi pihak [second defendant] sebagai kepunyaan [1st defendant]
>
> (Emphasis added.).

[22] Despite Zanwa's letter (14 August 2019), Zanwa's letter (26 September 2019), first defendant's WhatsApp message (3 October 2019), Zanwa's letter (10 October 2019) and Zanwa's email (19 November 2019), the plaintiff did not collect the two power transformers from the land.

[23] On 27 November 2019, Klang SC's bailiff ('bailiff') seized all movable properties on the land (including the two power transformers) pursuant to the WSS (seized movable properties). A 'Notis Penyitaan dan Inventori' (notice of seizure and inventory) dated 27 November 2019 was prepared by the bailiff (NSI). According to the NSI, among others:

(1) the bailiff had valued the seized movable properties to be worth RM200,000;

(2) the first defendant owed a sum of RM210,717.26 to the second defendant (first defendant's judgment debt (second defendant)); and

(3) unless the first defendant paid the first defendant's judgment debt (second defendant) together with all costs of execution of WSS to the second defendant within seven days from the date of NSI, a public auction of the seized movable properties would be conducted by the bailiff on 13 December 2019.

[24] Encik Sayaidina sent a WhatsApp message to Ir Thevindra on 10 December 2019 which stated that, among others, the two power transformers had been seized (the first defendant's WhatsApp message (10 December 2019)).

[25] Pending the disposal of the first defendant's HC appeal (second defendant's summary judgment), the first defendant applied to Klang SC for a stay of execution of the second defendant's summary judgment (Klang SC). On 24 December 2019, Klang SC granted a conditional stay of execution of the second defendant's summary judgment (Klang SC) (Klang SC's conditional stay order) namely, the execution of the second defendant's summary judgment (Klang SC) would be stayed pending the outcome of the first defendant's appeal (Klang HC) provided that the first defendant could deposit an amount of RM410,400 with the second defendant's solicitors, Messrs Mak Haisha & Co (second defendant's solicitors) as stakeholders within 30 days from the date of Klang SC's conditional stay order (condition (Klang SC's conditional stay order)).

[26] The first defendant did not comply with the condition (Klang SC's conditional stay order). Consequently, Klang SC's conditional stay order had lapsed.

[27] On 23 December 2019, Puan Wan Absah bt Wan Kadir (Puan Wan) filed a notice of application in the second defendant's suit (Klang SC) (Puan Wan's application (Klang SC)). Puan Wan's application (Klang SC) sought for the following orders:

(1) a declaration that the seized movable properties (except the two power transformers) are owned by Puan Wan; and

(2) an order for the bailiff to release the seized movable properties (other than the two power transformers) forthwith to Puan Wan.

In support of Puan Wan's application, Puan Wan affirmed an affidavit on 23 December 2019 (Puan Wan's affidavit) which stated in paras 5 and 8 that the plaintiff owns the two power transformers.

[28] Puan Wan's application (Klang SC) was dismissed with costs on 21 February 2020 ('Klang SC's dismissal (Puan Wan's application)'). On 25 February 2020, Puan Wan appealed to Shah Alam HC against Klang SC's dismissal (Puan Wan's application) (Puan Wan's appeal (Shah Alam HC)).

[29] After the delivery of Klang SC's dismissal (Puan Wan's application), the second defendant acted expeditiously and requested the bailiff to fix a date for

the public auction of the seized movable properties. The bailiff then fixed a public auction of the seized movable properties on 28 February 2020 (judicial auction).

[30] On 27 February 2020, the first defendant filed an application in Shah Alam HC to stay the execution of:

(1) the second defendant's summary judgment (Klang SC); and

(2) the WSS,

pending the disposal of the first defendant's HC appeal (second defendant's summary judgment) (first defendant's stay application (Shah Alam HC)).

[31] On 28 February 2020:

(1) the seized movable properties, including the two power transformers, were sold by the bailiff at the judicial auction to the third defendant (third defendant) for a sum of RM216,000 (sale proceeds (auction));

(2) Khairil Azmi bin Hj Mohamad Hasbie JC granted an *ex parte ad interim* stay of execution of the second defendant's summary judgment (Klang SC) and execution of the WSS pending the inter partes disposal of the first defendant's stay application (Shah Alam HC) (Shah Alam HC's ex parte ad interim stay order); and

(3) the first defendant's solicitors, Messrs Tengku Azlina, Rao, Low & Assoc (first defendant's solicitors), only emailed the Shah Alam HC's ex parte ad interim stay order to the second defendant's solicitors after the completion of the judicial auction. In other words, the Shah Alam HC's ex parte ad interim stay order could not prevent the judicial auction from being carried out.

[32] In the second defendant's suit (Klang SC), the first defendant filed two applications on 3 March 2020 and 22 June 2020 for the following orders from Klang SC, among others:

(1) the setting aside of the WSS and judicial auction;

(2) the return of the sale proceeds (auction) to the third defendant; and

(3) the return of the seized movable properties (except the two power transformers) to the first defendant,

(the first defendant's two setting aside applications (Klang SC)).

[33] Ir Thevindra sent an email dated 4 June 2020 to Ir Zainal and enquired about the status of the two power transformers.

[34] Zanwa sent a letter dated 9 June 2020 to Ir Thevindra (Zanwa's letter (9 June 2020)) which stated, among others, as follows:

(1) Zanwa had been wound up by Kuala Lumpur HC;

(2) Ir Thevindra had visited the land on 11 July 2019 and was given Zanwa's letter (11 July 2019). However, Ir Thevindra refused to accept Zanwa's letter (11 July 2019) and he asked for Zanwa's letter (11 July 2019) to be emailed or posted to the plaintiff;

(3) Zanwa's letter (26 September 2019), Zanwa's letter (14 August 2019) and Zanwa's letter (10 October 2019) had been sent for the plaintiff to collect the two power transformers from the land;

(4) the land had been sold to the second defendant;

(5) the first defendant had rented the land from the second defendant;

(6) there was a 'rental dispute' between the first and second defendants which was brought to court;

(7) all the assets on the land, including the two power transformers, had been auctioned by the second defendant; and

(8) the first defendant had filed another suit in court and had informed the court in that suit that the two power transformers belonged to the plaintiff. This suit was still on-going.

[35] On 9 June 2020, the first defendant's HC appeal (second defendant's summary judgment) was allowed with costs ('Shah Alam HC's decision (first defendant's appeal)'). The second defendant appealed to the Court of Appeal (CA) against Shah Alam HC's decision (first defendant's appeal) (second defendant's appeal (CA)).

[36] On 10 June 2020, on behalf of the plaintiff, Ir Thevindra lodged a police report against Ir Zainal as owner of Zanwa regarding the auction of the two power transformers by the second defendant.

[37] The plaintiff sent a letter dated 17 June 2020 to the first defendant's solicitors which required, among others, the first defendant to retrieve the two power transformers from the second defendant and to return the same to the plaintiff.

[38] A letter dated 17 June 2020 was sent by the plaintiff to the second defendant's solicitors (plaintiff's letter (17 June 2020)). According to the plaintiff's letter (17 June 2020), among others:

(1) the two power transformers belonged to the plaintiff under the contract (plaintiff-Zanwa);

(2) the second defendant had auctioned the two power transformers pursuant to the WSS; and

(3) the second defendant was required to return immediately the two power transformers to the plaintiff because the second defendant had no right to auction the two power transformers which belonged to the plaintiff.

[39] On 21 September 2020, Tee Geok Hock JC (as he then was) allowed Puan Wan's appeal (Shah Alam HC) with costs (HC's decision (Puan Wan's application)). According to the HC's decision (Puan Wan's application):

(1) Klang SC's dismissal (Puan Wan's application) was set aside; and

(2) the dispute regarding the ownership of the seized movable properties should be tried, if necessary, in the second defendant's suit (Klang SC) or in another action (Klang SC's trial (ownership of seized movable properties)).

At the time of our decision in this appeal, Klang SC's trial (ownership of seized movable properties) is still pending.

[40] The first defendant's two setting aside applications (WSS and judicial auction) were allowed by Klang SC (with no order as to costs) on 25 November 2020 (Klang SC's decision (setting aside of WSS and judicial auction)). The third defendant has filed an appeal to Klang HC against Klang SC's decision (setting aside of WSS and judicial auction) ('third defendant's appeal (Klang HC)').

[41] The second defendant's appeal (CA) was allowed with costs on 27 January 2021 ('CA's decision (second defendant's appeal)'). By virtue of CA's decision (second defendant's appeal), the second defendant's summary judgment (Klang SC) is restored (except for a minor variation of para (c) of the second defendant's summary judgment (Klang SC)). For the purpose of this appeal, the second defendant's summary judgment (Klang SC) is final and binding.

[42] On 28 May 2021, the third defendant's appeal (Klang HC) was allowed ('Klang HC's decision (third defendant's appeal)'). The first defendant has obtained leave of CA to appeal to CA against Klang HC's decision (third defendant's appeal) (first defendant's appeal (CA)). The first defendant's appeal (CA) has not been heard at the time of the decision of this appeal.

C. THIS AMENDED ORIGINATING SUMMONS (AMENDED OS)

[43] In this amended OS (first filed in Klang HC on 6 August 2020), the plaintiff applied for the following relief against the first to third defendants (collectively referred to in this judgment as the 'defendants'), among others:

(1) a declaration that:

(a) the plaintiff is the lawful and beneficial owner of the two power transformers;

(b) the seizure and sale of the two power transformers pursuant to the WSS and judicial auction respectively are invalid and void; and

(c) any interest in the two power transformers obtained by the third defendant is unlawful and is hereby set aside;

(2) an order for the defendants to return and/or ensure the return of the two power transformers to the plaintiff within seven days from the date of the order to be made by Klang HC;

(3) an order for general damages to be assessed regarding all the loss suffered by the plaintiff; and

(4) in the alternative, if the defendants do not have possession or custody of the two power transformers, an order for the defendants to pay to the plaintiff a sum of money which is equivalent to the plaintiff's payment (Zanwa).

[44] In the amended OS, on behalf of the first defendant, Encik Sayaidina had affirmed an affidavit on 11 September 2020 which admitted in sub-para 7.1 that TNB owns the two power transformers (the first defendant's affidavit).

[45] Klang HC dismissed the amended OS with costs of RM20,000 to be paid by the plaintiff to each of the three defendants (subject to allocatur fee) (Klang HC's decision). The plaintiff has filed this appeal to CA against Klang HC's decision (this appeal).

D. REASONS FOR KLANG HC'S DECISION

[46] The following reasons for Klang HC's decision were given in the learned HC judge's grounds of judgment (GOJ):

(1) in paras 22 and 25 GOJ, the learned HC judge relied on the Federal Court's (FC) judgment in *Lim Ker v Chew Seok Tee* [1967] 2 MLJ 253 to decide that the bailiff could lawfully seize the two power transformers in the possession of the first defendant (bailiff's seizure (two power transformers));

(2) prior to the judicial auction, the plaintiff had knowledge of the second defendant's suit (Klang SC) and bailiff's seizure (two power transformers) but the plaintiff failed to send any letter to the second defendant to oppose the bailiff's seizure (two power transformers) — please refer to para 24 GOJ;

(3) according to paras 25 to 27 GOJ, the burden was on the plaintiff (not the second defendant) to prove that the two power transformers belong to the plaintiff;

(4) in paras 28–32 and 69 GOJ, the learned HC judge decided as follows:

(a) the plaintiff had no ownership of the two power transformers because:

(i) the construction of the two power transformers had not been completed; and

(ii) the plaintiff had not paid in full the price (two power transformers) to Zanwa;

(b) with regard to the two power transformers, Zanwa was the interested party and 'it begs the question' as to why the plaintiff did not make Zanwa a party in this amended OS;

(c) as the plaintiff had no possession of the two power transformers and had no immediate right to possess the same, the plaintiff had 'no locus standi and/or cause of action' against the first and second defendants for the tort of conversion; and

(d) the second defendant's dealing of the two power transformers in this case did not amount to a commission of tort of conversion. This was because Klang HC's decision (third defendant's appeal) had decided that the execution of the WSS and judicial auction was done pursuant to legal process;

(5) according to the learned HC judge in paras 33–39, 54–64 and 73 GOJ, due to the plaintiff's inaction and delay in claiming for the two power transformers (alleged plaintiff's inaction), the plaintiff was barred by laches, acquiescence, waiver, estoppel and/or abandonment from succeeding in the amended OS;

(6) in view of the alleged plaintiff's inaction, the learned HC judge refused to exercise his discretion under s 41 of the Specific Relief Act 1950 ('the SRA') to grant declarations in favour of the plaintiff in the amended OS — please refer to paras 40–46 GOJ. In para 46 GOJ, the HC held as follows:

> [46] *Since the auction took place on 28 February 2020, the plaintiff could have filed a claim to the bailiff for interpleader be applied or any necessary application to the court when it received information from the first defendant on 10 December 2019 that two units of transformers were seized by the second defendant but the plaintiff failed to take any action.* (Emphasis added.);

(7) in paras 47–52 and 70–72 GOJ, the learned HC judge determined that as the third defendant was a bona fide purchaser of the two power transformers who had paid the sale proceeds (auction) without any notice of the plaintiff's claim on the two power transformers, the third defendant should be entitled to the two power transformers; and

(8) the learned HC judge decided that the amended OS had been filed for a collateral purpose, namely to overcome the alleged plaintiff's inaction — please see para 75 GOJ.

E. SUBMISSION BY PARTIES

[47] The plaintiff's learned counsel has advanced, among others, the following contentions in support of this appeal:

(1) as the plaintiff is the equitable owner of the two power transformers ('plaintiff's equitable ownership (two power transformers)'):

(a) the bailiff's seizure (two power transformers); and

(b) the judicial auction of the two power transformers ('judicial auction (two power transformers)'),

are unlawful and void;

(2) before the judicial auction (two power transformers), the second defendant had actual knowledge of plaintiff's equitable ownership (two power transformers) from Puan Wan's affidavit (filed in support of Puan Wan's application in the second defendant's suit (Klang SC));

(3) the plaintiff was not barred by laches, acquiescence, waiver, estoppel and/or abandonment in this case because of the following reasons, among others:

(a) the plaintiff was only informed of the bailiff's seizure (two power transformers) and judicial auction (two power transformers) in Zanwa's letter (9 June 2020);

(b) the plaintiff did not have 'full knowledge' regarding the two power transformers; and

(c) after the plaintiff had been informed of the bailiff's seizure (two power transformers) and judicial auction (two power transformers) in Zanwa's letter (9 June 2020), the plaintiff had taken the following steps, among others, to recover the two power transformers:

(i) the plaintiff had sent letters to the first defendant's solicitors and second defendant's solicitors on 17 June 2020 (which, among others, demanded for the return of the two power transformers);

(ii) the plaintiff had attempted to visit the land on 20 June 2020;

(iii) the plaintiff had to ascertain all the relevant facts and compile

evidence regarding the two power transformers before filing this present suit on 6 August 2020;

(iv) the plaintiff had to appoint its present solicitors (plaintiff's solicitors) to file this amended OS; and

(v) the plaintiff's solicitors had to expend time to draft the cause papers for this amended OS;

(4) the plaintiff was not required to cite Zanwa as a co-defendant in this case because:

(a) the plaintiff's cause of action against Zanwa was for a breach of the contract (plaintiff-Zanwa) (plaintiff's cause of action (Zanwa));

(b) the plaintiff's cause of action (Zanwa) had no bearing on this amended OS; and

(c) Zanwa did not play any part in the bailiff's seizure (two power transformers); and

(5) the plaintiff has the following three causes of action to support the amended OS:

(a) the first and second defendants had committed the tort of conversion and/or tort of negligence with regard to the bailiff's seizure (two power transformers) and judicial auction (two power transformers); and

(b) the third defendant has been unjustly enriched in respect of the two power transformers and should return the same to the plaintiff.

[48] According to the first defendant's learned counsel, the plaintiff cannot succeed to claim damages from the first defendant based on the tort of conversion and/or tort of negligence because:

(1) Zanwa had requested from the first defendant for the two power transformers to remain on the land until collected by the plaintiff;

(2) the first defendant had given notice to the plaintiff to collect the two power transformers on the land;

(3) both the first defendant and first defendant's solicitors had informed the second defendant as well as the second defendant's solicitors regarding the plaintiff's equitable ownership (two power transformers); and

(4) notwithstanding the fact that the second defendant had actual notice of the plaintiff's equitable ownership (two power transformers), the second defendant proceeded with the judicial auction (two power transformers). Hence, the second defendant (not the first defendant) was liable to the plaintiff in this case for the tort of conversion and/or tort of negligence.

[49] The second defendant has opposed this appeal on the following grounds, among others:

(1) premised on the documentary evidence adduced in this case, the learned HC judge has correctly decided the existence of the alleged plaintiff's inaction;

(2) the alleged plaintiff's inaction supports the learned HC judge's decision that this amended OS is barred by laches, acquiescence, waiver, estoppel and/or abandonment;

(3) as the first defendant's WhatsApp message (10 December 2019) had informed the plaintiff regarding the bailiff's seizure (two power transformers), the plaintiff should have commenced interpleader proceedings in the second defendant's suit (Klang SC) under O 17 r 2 of the Rules of Court 2012 ('the RC') to claim for the return of the two power transformers (interpleader proceedings);

(4) the plaintiff had no right to sue the second defendant for the tort of conversion because:

(a) the construction of the two power transformers had not been completed by Zanwa;

(b) Zanwa had not issued 'Taking Over Certificate' to the plaintiff regarding the two power transformers; and

(c) the plaintiff has not paid Zanwa in full the price (two power transformers); and

(d) due to the above reasons, the plaintiff had no immediate right to possess the two power transformers;

(5) the plaintiff should have joined Zanwa as a co-defendant in this amended OS;

(6) by virtue of the proviso to s 41 of the SRA, the learned HC judge had correctly declined to grant declarations in favour of the plaintiff. This was because the plaintiff was able to seek further relief by filing interpleader proceedings and should not have merely applied for a declaration of title with regard to the two power transformers (in this amended OS); and

(7) this court should take judicial notice of a scheme to defraud the second defendant by depriving the second defendant of its right to enjoy the fruits of the second defendant's summary judgment (Klang SC) (alleged fraudulent scheme). The alleged fraudulent scheme, according to the second defendant's learned counsel, is as follows:

(a) Zanwa and first defendant are the 'same entity' which is controlled by Ir Zainal; and

(b) Puan Wan is Ir Zainal's wife.

[50] The third defendant resisted this appeal on the following grounds, among others:

(1) the third defendant was a bona fide purchaser of the two power transformers who had paid the sale proceeds (auction) without any notice of the plaintiff's claim on the two power transformers; and

(2) if this appeal is allowed, the third defendant would suffer the following loss:

(a) the cost of employing security guards on the land at a rate of RM96 per day; and

(b) despite the fact that the third defendant had paid in full the sale proceeds (auction), the third defendant could not use the two power transformers, (third defendant's loss).

F. ISSUES

[51] The following questions arise in this appeal:

(1) did the plaintiff discharge the legal burden to prove on a balance of probabilities the plaintiff's equitable ownership (two power transformers)?

(2) if the plaintiff's equitable ownership (two power transformers) is proven:

(a) with regard to the main issue referred to in the above para 1, could the second defendant lawfully seize and sell the two power transformers to the third defendant in the judicial auction (two power transformers)? The resolution of the main issue depends on an interpretation of O 45 r 12(1) and Form 84 in Appendix A to RC (Form 84) read with O 1 r 7 of the RC;

(b) can the learned HC judge rely on Klang HC's decision (third defendant's appeal) which decided that the execution of the WSS and judicial auction was lawful when:

(i) the plaintiff was not a party in the first defendant's two setting aside applications (Klang SC) and Klang HC's decision (third defendant's appeal); and

(ii) the plaintiff was not given a right to be heard regarding the plaintiff's equitable ownership (two power transformers)?

(c) whether the learned HC judge had made a plain error of fact in deciding that:

(i) the alleged plaintiff's inaction existed; and

(ii) this amended OS was barred by laches, acquiescence, waiver, estoppel and/or abandonment; and

(d) if the second defendant could not lawfully seize and sell the two power transformers to the third defendant:

(i) could the plaintiff have commenced interpleader proceedings in the second defendant's suit (Klang SC) (instead of filing a fresh action, ie, this amended OS)?

(ii) can the court order a return of the two power transformers to the plaintiff pursuant to s 9 of the SRA (restitution order) without the need for the plaintiff to prove:

(ii)(a) tort of conversion and/or tort of negligence have been committed by the first and second defendants; and

(ii)(b) the unjust enrichment of the third defendant in respect of the two power transformers?

(iii) whether the court can refuse to make a restitution order on the ground that the third defendant was a bona fide purchaser of the two power transformers for valuable consideration without any actual notice of the plaintiff's equitable ownership (two power transformers);

(iv) was the plaintiff required to cite Zanwa as a co-defendant in this amended OS? This entails a discussion of O 1A, O 2 r 1(2), O 15 r 6(1), (2)(b)(i) and (ii) of the RC; and

(v) whether the learned HC judge had erred in the exercise of His Lordship's discretion under s 41 of the SAR in refusing to grant declarations sought by the plaintiff in this case. This issue also concerns the application of the proviso to s 41 of the SRA;

(3) can the plaintiff claim that the first and second defendants had committed a tort of negligence in respect of the two power transformers? In this regard:

(a) whether the first and second defendants owed a duty of care to the plaintiffs in respect of the two power transformers (duty of care (two power transformers));

(b) if the first and second defendants owed a duty of care (two power transformers), did the first and second defendants breach the duty of care (two power transformers) (breach (duty of care))? and

(c) on the assumption that there was a breach (duty of care), had the plaintiff suffered any loss or damage due to the breach (duty of care)?

(4) with regard to the plaintiff's claim against the first and second defendants for the tort of conversion:

(a) in respect of the plaintiff's right to sue for the tort of conversion (right to sue (conversion)): A

(i) whether proof of the plaintiff's equitable ownership (two power transformers) can confer a right to sue (conversion) on the plaintiff without the need for the plaintiff to prove a right to immediate possession of the two power transformers under the contract (plaintiff-Zanwa) (right to immediate possession (two power transformers)); and B

(ii) if the plaintiff was required to prove right to immediate possession (two power transformers), did the plaintiff possess such a right at the time of the judicial auction (two power transformers)? and C

(b) if the plaintiff had a right to sue (conversion):

(i) did the first and second defendants commit a tort of conversion regarding the two power transformers (conversion (two power transformers))? and D

(ii) if the first and second defendants had committed conversion (two power transformers), whether the plaintiff had suffered any loss due to the conversion (two power transformers); E

(5) is the third defendant liable to the plaintiff for unjust enrichment in respect of the two power transformers?

(6) can the court take judicial notice of the alleged fraudulent scheme under s 57 of the Evidence Act 1950 ('the EA')? If the court can take judicial notice of the alleged fraudulent scheme, whether the Klang HC's decision can be justified on the alleged fraudulent scheme; and F

(7) if the judicial auction (two power transformers) is set aside by court, can the third defendant's loss be claimed by way of a fresh action by the third defendant against the second defendant for tort of abuse of court process regarding the judicial auction (two power transformers)? G

OUR DECISION

G. HAD PLAINTIFF'S EQUITABLE OWNERSHIP (TWO POWER TRANSFORMERS) BEEN PROVEN? H

G(1). Legal and evidential burden

[52] Section 101(1) and (2) of the EA provide for legal burden of proof while s 102 of the EA concerns evidential burden of proof. The distinction between legal and evidential burden is explained in *Lilies Suraya bt Abdul Latib & Ors v Khairul bin Sabri & Others* [2020] 4 AMR 365, at para [17], as follows (in the context of a claim based on the tort of negligence): I

[17] *I am of the following view*:

(1) *the plaintiffs have the legal burden under s 101(1) and (2) of the EA to prove on a balance of probabilities that the defendants are negligent regarding the incident (legal burden). This legal burden rests on the plaintiffs throughout the trial and does not shift to the defendants at any time — please refer to Letchumanan Chettiar Alagappan*;

(2) the evidential burden pursuant to s 102 of the EA (evidential burden) lies on the plaintiffs to adduce evidence to prove a prima facie case of the defendants' negligence with regard to the incident (prima facie case). Regarding this evidential burden:

(a) in the Singapore Court of Appeal case of *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR 855, at para [60], VK Rajah JCA held that a prima facie case may be established by a plaintiff adducing evidence which is not 'inherently incredible'; and

(b) once the plaintiffs have proven a prima facie case, the evidential burden shifts to the defendants to adduce rebuttal evidence that the defendants have not been negligent in respect of the incident; and

(3) after a trial —

(a) the court has to decide whether there is evidence on a balance of probabilities to prove the defendants' negligence in the incident. I refer to the definitions of 'proved' and 'disproved' in s 3 of the EA as follows:

'proved': a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists 'disproved': a fact is said to be 'disproved' when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist' (Emphasis added.);

(b) *if the plaintiffs have adduced sufficient evidence on a balance of probabilities to prove that the defendants have been negligent regarding the incident, the plaintiffs have successfully discharged the legal burden and evidential burden under s 101 and 102 of the EA respectively to prove their claim against the defendants; and*

(c) *if there is no adequate evidence to prove on a balance of probabilities that the defendants have been negligent in the incident, the plaintiffs have failed to discharge the legal burden and evidential burden. Consequently, the original action has to be dismissed on this ground alone.* (Emphasis added.).

[53] When an execution creditor ('ECr') seizes movable property under a WSS and there is a party who claims equitable ownership of the movable property (claimant), we are of the following view regarding who has the legal and evidential burden with regard to the proof of beneficial ownership of the movable property:

(1) there are two scenarios (two scenarios), namely:

(a) in the first scenario (first scenario), at the time of ECr's seizure of the movable property, the movable property is in the possession, care or custody of the execution debtor (EDr); and

(b) when movable property is seized by ECr, the movable property is in the possession, care or custody of the claimant or any other party (second scenario);

(2) the two scenarios have been elucidated by Abdul Malek Ahmad J (as he then was) in the HC case of *Development & Commercial Bank Bhd v Lam Chuan Company & Anor* [1989] 1 MLJ 318, at pp 320–321 ('*D&C Bank*'s case'), as follows:

> *In Mallal's Supreme Court Practice by Tan Sri Chang Ming Tat at p 173 it is stated that in a sheriff's interpleader the claimant is as a general rule made the plaintiff and the burden of proof rests upon him where the goods seized were at the time of seizure in possession of the judgment debtor, possession being prima facie evidence of title. If, however, the claimant was in possession at the seizure the burden of proof may be upon the execution creditor thus reversing the ordinary rule and the execution creditor may be made plaintiff. I was of the opinion that it is actually for the execution creditor here to prove that the judgment debtor was the actual lawful owners of the goods attached but which they had failed to do. In any case, it was my view that based on the evidence taken before the senior assistant registrar, the affidavits averred and authorities cited, the claimant had in fact and in law succeeded in establishing that they were the actual lawful owners of the attached property seized on the premises.* (Emphasis added.)

The above judgment in *D&C Bank*'s case has been adopted by Augustine Paul JC (as he then was) in the HC in *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697, at pp 703–704;

(3) premised on *D&C Bank*'s case and *Tan Kim Khuan*:

(a) in the first scenario, the claimant bears the legal burden to satisfy the court that the claimant (not EDr) is the equitable owner of the movable property. Furthermore, according to s 106 of the EA, the claimant should bear the onus to prove the claimant's beneficial ownership of the movable property which is 'especially within the knowledge' of the claimant. Section 106 of the EA provides as follows:

> *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.* (Emphasis added.)

(b) with regard to the second scenario, ECr has the legal burden to prove that EDr (not the claimant) has equitable ownership of the movable property;

(4) s 114(e) of the EA provides as follows:

> 114 Court may presume existence of certain fact
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to* the common course of natural events, *human conduct, and* public and *private business, in their relation to the facts of the particular case*.
>
> *ILLUSTRATIONS*
>
> ...
>
> (e) that *judicial* and official *acts have been regularly performed*. (Emphasis added.)

seizures of movable properties under WSS and their subsequent sales by way of judicial auctions are conducted by court officers. It is thus clear that execution of WSS and conduct of judicial auctions are 'judicial' acts within the meaning of s 114(e) of the EA.

In the first scenario, s 114(e) of the EA fortifies our view that the claimant (not ECr) has the legal burden to prove that the claimant is the beneficial owner of movable property in the possession, care or custody of the EDr. However, in the second scenario, s 114(e) of the EA does not raise any rebuttable presumption in favour of ECr-ECr (not the claimant) has the legal burden to prove that the EDr is the equitable owner of movable property in the possession, care or custody of the claimant or any other party. Our reasons are as follows:

(a) the court has a discretion to invoke s 114(e) of the EA. Such a discretion is clear from the employment of the directory term 'may' in s 114(e) of the EA; and

(b) the court should not exercise its discretion to apply s 114(e) of the EA in the second scenario because:

(i) if ECr has actual knowledge that EDr is the beneficial owner of a movable property in the possession, care or custody of the claimant or any other party, in accordance with s 106 of the EA, ECr has the legal burden to prove such knowledge; and

(ii) if the court allows the application of s 114(e) of the EA in the second scenario, this will confer a *carte blanche* on ECrs to seize and sell movable properties in the possession, care or custody of the claimant or any other party. Such an outcome is neither just nor desirable as ECrs may abuse court process regarding WSS and judicial auctions.

(5) the legal burden can only be discharged with the production of evidence which satisfies the court on a balance of probabilities; and

(6) in the two scenarios:

(a) if the party who has legal burden (X), has not adduced any evidence to discharge X's legal burden, the court should then decide in favour of the opposing party (Y) — please refer to *Tan Kim Khuan*, at p 707. Such a decision should be reached by the court even if Y has not produced any evidence in support of Y's case. This is because X has failed to discharge the legal burden and there is no legal burden on Y to present any evidence to support Y's case and to rebut X's case; and

(b) if X has adduced evidence which is not inherently incredible regarding X's legal burden (X's prima facie case), the evidential burden will then shift from X to Y. In such a situation, the court has to decide as follows:

(i) if Y has produced sufficient evidence to rebut X's prima facie case on a balance of probabilities, the court should decide in Y's favour and determine that X has failed to discharge the legal burden to prove X's case on a balance of probabilities; or

(ii) if Y does not present any evidence to rebut X's prima facie case or if the evidence adduced by Y cannot rebut X's prima facie case on a balance of probabilities, the court should deliver a decision in X's favour and determine that X has succeeded to discharge the legal burden on a balance of probabilities.

G2. Whether plaintiff had discharged legal burden to prove plaintiff's equitable ownership (two power transformers)

[54] It is not disputed that at the time of the bailiff's seizure (two power transformers), the two power transformers were in the possession of the first defendant (EDr). In other words, this case concerns the first scenario and consequently, the plaintiff bears the legal burden to prove the plaintiff's equitable ownership (two power transformers) on a balance of probabilities.

[55] We are of the view that the learned HC judge has committed a plain error of fact in failing to decide that the plaintiff's equitable ownership (two power transformers) has been proven by the plaintiff on a balance of probabilities (*first appealable error*). The first appealable error is borne out by the following evidence and reasons:

(1) the contract (plaintiff-Zanwa);

(2) 'Purchase orders' had been issued by the plaintiff to Zanwa with regard to the two power transformers (plaintiff's POs);

(3) Zanwa's invoices to the plaintiff in respect of the two power transformers (Zanwa's invoices); and

(4) plaintiff's internal 'Memorandum' (plaintiff's memorandum) which evidenced the plaintiff's payment (Zanwa);

(5) correspondence between the plaintiff and Zanwa regarding the two power transformers (correspondence (plaintiff-Zanwa));

(6) in Zanwa's letter (14 August 2019), Zanwa had admitted that Zanwa could not complete the contract (plaintiff-Zanwa) (Zanwa's admission). It is clear from Zanwa's admission that Zanwa had breached the contract (plaintiff-Zanwa) (Zanwa's breach);

(7) Zanwa's liquidator did not dispute Zanwa's breach. Nor was there a claim on the two power transformers by Zanwa's liquidator; and

(8) the contents of the contract (plaintiff-Zanwa), plaintiff's POs, Zanwa's invoices, plaintiff's memorandum, plaintiff's correspondence (plaintiff-Zanwa) and Zanwa's letter (14 August 2019) are not disputed by the defendants. Nor did the defendants adduce any evidence to rebut the contents of the contract (plaintiff-Zanwa), plaintiff's POs, Zanwa's invoices, plaintiff's memorandum, correspondence (plaintiff-Zanwa) and Zanwa's letter (14 August 2019). In fact, the plaintiff's equitable ownership (two power transformers) was admitted in the first defendant's affidavit.

H. WHETHER BAILIFF'S SEIZURE (TWO POWER TRANSFORMERS) AND JUDICIAL AUCTION (TWO POWER TRANSFORMERS) ARE VALID

[56] We reproduce below O 1 r 7, O 45 r 12(1) of the RC and Form 84:

O 1 r 7 Forms

The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.

O 45 r 12 Forms of writs

(1) *A writ of seizure and sale shall be in Form 84 (for movable property) for the High Court* and in Form 84A (for movable property) for the Subordinate Courts or Form 85 (for immovable property).

No 84

WRIT OF SEIZURE AND SALE (MOVABLE PROPERTY)

(O 45, r 12)

(Title as in action)

THE HONOURABLE

CHIEF JUDGE OF MALAYA/SABAH & SARAWAK, IN THE NAME OF THE YANG DI-PERTUAN AGONG

To the Sheriff,

We command you that you cause to be levied and made out of the property liable to be seized under a writ of seizure and sale which shall be identified by or on behalf of (name of execution creditor) as belonging to (name of execution debtor) now or late of (address of execution debtor) by seizure and if it be necessary by sale thereof RM ... which the said (name of execution creditor) lately in Our Court recovered against the said (name of execution debtor) by a judgment (or order or as may be) bearing the ... day of ..., 20 ... And in what manner you shall have executed this. Our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ. ... (Emphasis added.).

[57] We are of the following view:

(1) O 1 r 7 of the RC provides that Forms in Appendix A to the RC 'shall be used where applicable with such variations as the circumstances of the particular case require';

(2) O 45 r 12(1) of the RC has expressly provided that a WSS for movable property 'shall' be in Form 84;

(3) Form 84 is addressed to the 'Sheriff' (defined in O 1 r 4(1) of the RC to mean the 'Registrar' of the High Court and Subordinate Court). Order 1 r 4(1) of the RC also provides a wide meaning of 'Registrar'. According to O 1 r 4(1) of the RC, 'bailiff' includes the 'Registrar, any clerk or other officer of the Court charged with performing the duties of a bailiff';

(4) The words in Form 84 require the Sheriff and bailiff to 'cause to be levied and made out of the property liable to be seized under a writ of seizure and sale which shall be identified by or on behalf of (name of execution creditor) as belonging to (name of execution debtor)'. It is clear from Form 84 that the Sheriff and bailiff can only lawfully seize and sell movable property pursuant to a WSS when the movable property belongs in equity to the EDr. Accordingly, the main issue (stated in the above para 1) has to be resolved as follows: if movable property belongs in equity to a third party, the Sheriff and bailiff *cannot* lawfully seize and sell the movable property under the WSS;

(5) if the Sheriff and bailiff can lawfully seize and sell movable asset in the possession of EDr which belongs in equity to a third party under the WSS, such a legal position is contrary to the wording of Form 84 read with O 1 r 7 and O 45 r 12(1) of the RC. It is decided in *Ktl Sdn Bhd v Leong Oow Lai* [2014] MLJU 1405, at para 95(b)(iv), as follows:

> [95] ...
>
> (b) ...
>
> (iv) *order 1 r 7 of the RC allows variation to a form in Appendix A to RC (Appendix A) as the circumstances of the particular case require but O 1 r 7 of the RC does not allow a party to use a form contrary to its purpose — Brandon J's (as His Lordship then was) judgment in the English High Court case of The Cap Bon* [1967] 1 Lloyd's Rep 543. *I hold that a party cannot use a form in Appendix A contrary to the express*

wording in that form. (Emphasis added.)

(6) the above answer to the main issue is supported by the following cases:

(a) Ong Hock Thye FJ (as he then was) has decided as follows in *Lim Ker*, at p 255:

> *The simple reason is that a judgment creditor can levy execution only on property belonging to the debtor or appearing to belong to him by reason of being in his apparent possession, not, certainly, on property belonging to any third party at the creditor's mere whim and fancy.* (Emphasis added.);

(b) in *Ng Boo Bee v Khaw Joo Choe* [1921] 1 LNS 8, Sproule J decided as follows in the Supreme Court (SC) of the Straits Settlements (SS):

> *I think it is very clear that only such beneficial interest as a judgment debtor possesses can be seized, and that the order of attachment is an assurance affecting only such beneficial interest in the land. As counsel on both sides agreed tersely to express it, a judgment creditor may seize only what the debtor can lawfully sell.*
>
> ...
>
> *In the result, there must be a declaration that the land was wrongly seized and must be released and that the registration of the order of 29 January ought to be cancelled. The claimants must recover from the plaintiff their costs of the issue.* (Emphasis added.)

The SC of SS was a court of first instance. The judgment creditor in *Ng Boo Bee* had appealed against the above judgment of Sproule J to the CA of SS (*CA (SS)*). Sproule J's judgment was affirmed by a 2–1 majority decision of the CA (SS) (Bucknill CJ and Ebden J were in the majority while Earnshaw J dissented). We reproduce below the majority judgments of Bucknill CJ and Ebden J:

(i) according to Bucknill CJ:

> *I take it that if it is satisfactorily proved that the property seized did not belong to the judgment debtor at the time when the writ of seizure was registered against the property, that such property must be released, the order of release automatically setting aside the writ of seizure.*
>
> ...
>
> *No question of priority as between the two assurances could in my opinion therefore arise until it had been decided that the property seized did at the date of seizure belong to the judgment debtor and that the writ of seizure was consequently intrinsically good. I am, therefore, satisfied that on what are admitted facts (and I may here say that there was no fraud of any kind alleged) the property seized did not at the date of the registration of the writ of seizure belong to the judgment debtor; the property must therefore be released and the writ of seizure automatically disappears. The appeal therefore must be dismissed.* (Emphasis added.)

(ii) Ebden J decided as follows:

> *According to Eyre v Macdowell the writ [of seizure and sale] operates only on the beneficial interest of the debtor, and if the debtor has divested himself entirely of that interest there is nothing left on which the writ can operate.* (Emphasis added.);

(c) *D&C Bank*'s case, at p 321; and

(d) in *Whitworth v Gaugain* (1846) 41 ER 809, at pp 810 and 811–812, Lord Cottenham LC gave the following judgment of the English High Court of Chancery:

> *The only question is whether the equitable mortgagee in this case is entitled to priority over the elegits [writ of execution of judgment] and judgments.*
>
> ...
>
> *A judgment has relation to the time when it is entered up. It will not affect any bona fide conveyance made for value before that time, for it only attaches upon that which is then, or afterwards becomes, the property of the debtor. But the rule is not confined to that which was his property at law. If it is charged in equity before the entry of the judgment, the judgment will not affect such charge. It can only attach upon the interest which remains in the debtor, viz., the legal estate subject to the equitable charge. Upon a judgment obtained against a mere trustee a Court of Equity would never permit the trust property to be applied in satisfaction of the judgment; and for the same reason, if the property is subject to a trust short of its full value, the judgment can only in equity affect that which remains after the trust is satisfied, for this alone is the property of the debtor*.
>
> ... Many other similar cases might be stated shewing that, as well in the instance not merely of express trusts, but of trusts *in the view of a Court of Equity, the judgment creditor can take only what remains in the trustee after satisfying the trusts with which the property is charged*.
>
> ...
>
> *The same rule holds in the case of an extent against the goods of a debtor to the Crown; and equitable interests in those goods are respected*.
>
> ...
>
> *In the argument on the part of the defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a judgment obtained without notice of a previous charge and a purchase or mortgage. In the case already mentioned, of Burgh v Francis, judgments had been obtained, but they were not allowed to prevail against the plaintiff's equity.' A purchaser without notice of the trust,' Lord Nottingham observed, 'may be free, but an incumbrance' (speaking of the judgments) 'is not like a sale.' The learned author of the Forum Romanum expresses himself to the same effect. 'In the case of a judgment creditor,' he says, 'the original security was only personal, and a Court of Equity will not suffer the person that originally lent upon the security of land to*

have the security destroyed by one who did not lend upon that security.' (Emphasis added.)

[58] In view of the plaintiff's equitable ownership (two power transformers) and the resolution of the main issue (please refer to the above paras 55 and 57), the learned HC judge should have decided that the bailiff's seizure (two power transformers) and judicial auction (two power transformers) are invalid (second appealable error).

[59] In support of Klang HC's decision, the learned HC judge has relied on Klang HC's decision (third defendant's appeal) (which has decided that the execution of the WSS and judicial auction was lawful). However, the plaintiff was not a party in the first defendant's two setting aside applications (Klang SC) and Klang HC's decision (third defendant's appeal). Accordingly, the plaintiff was not given a right to be heard regarding the plaintiff's equitable ownership (two power transformers) in the first defendant's two setting aside applications (Klang SC) and Klang HC's decision (third defendant's appeal).

Our highest courts have decided that a decision, judgment and order (decision/judgment/order) does not bind a party if the party has been deprived of his or her right to be heard before the decision/judgment/order is made:

(1) the judgment of Mohd Azmi SCJ in the SC case of *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303, at p 306; and

(2) Edgar Joseph Jr FCJ's decision in the FC in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, at pp 381–382 and 383.

Based on the above reason, we have no hesitation to decide that the learned HC judge's reliance on Klang HC's decision (third defendant's appeal) to support the Klang HC's decision, constitutes an error of law (third appealable error).

I. IS PLAINTIFF BARRED BY THE ALLEGED PLAINTIFF'S INACTION, LACHES, ACQUIESCENCE, WAIVER, ESTOPPEL AND/OR ABANDONMENT?

I(1); Did the plaintiff have knowledge of all relevant facts?

[60] We are of the view that before the court decides that a party (Z) is barred from filing a suit or advancing a certain legal position in a dispute due to Z's omission, inordinate delay, laches, acquiescence, waiver, estoppel and/or abandonment, the court should consider the following three matters:

(1) whether Z has actual knowledge of all the relevant facts of the case in question (relevant facts);

(2) has Z wilfully shut Z's eyes to relevant facts which are obvious (wilful blindness)? Cases have referred to wilful blindness as 'Nelsonian knowledge', 'Wilful Ignorance' and 'Contrived Ignorance'; and

(3) if Z has actual knowledge of the relevant facts or is willfully blind to the same on a certain date (relevant date), Z's conduct from the relevant date should then be considered by the court.

[61] The relevant facts in this case are as follows (in chronological order):

(1) sale of the land to the second defendant by a public auction;

(2) tenancy agreement (first defendant-second defendant);

(3) Zanwa's winding-up;

(4) second defendant's suit (Klang SC);

(5) second defendant's summary judgment (Klang SC);

(6) second defendant had obtained WSS from Klang SC;

(7) bailiff's seizure (two power transformers); and

(8) judicial auction (two power transformers).

[62] Until Zanwa's letter (9 June 2020), Zanwa had concealed the following relevant facts from the plaintiff:

(1) sale of the land to the second defendant by way of public auction;

(2) tenancy agreement (first defendant-second defendant);

(3) Zanwa's winding-up; and

(4) judicial auction (two power transformers)

(5) (Zanwa's concealment).

[63] In addition to Zanwa's concealment, Zanwa had also deceived the plaintiff (Zanwa's deception). The following documentary evidence proves Zanwa's deception:

(1) the land had been sold to the second defendant by public auction and yet, Zanwa's letter (14 August 2019) and Zanwa's letter (9 June 2020) did not state such a material fact. There is a vast difference between a sale of immovable property by its owner in 'open market' and a sale of the immovable property by way of a public auction (forced sale). When a person's land is sold by way of public auction, this means the owner of the auctioned land is facing financial difficulties wherefore his land has to be auctioned;

(2) Zanwa's letter (11 July 2019) informed the plaintiff that Zanwa's operations stopped 'temporarily' due to Zanwa's financial problems. Such a statement was less than honest because Zanwa had been wound up by the winding up court and its liquidator had also been appointed by the winding up court;

(3) upon Zanwa's winding up, only Zanwa's liquidator (not Zanwa's directors, employees, agents and any other person) has the power under s 486(1)(a) of the Companies Act 2016 ('the CA') read with para (d) in Part I of the Twelfth Schedule to CA (para (d) (Part I, 12th Schedule)) to send any letter on behalf of Zanwa. We reproduce below s 486(1)(a) of the CA and para (d) (Part I, 12th Schedule):

> 486(1) *Where a company is being wound up by the Court, the liquidator may —*
>
> (a) *without the authority under para (b), exercise any of the general powers specified in Part I of the Twelfth Schedule ...*
>
> para (d) [Part I, 12th Schedule]
>
> *The liquidator may —*
>
> ...
>
> (d) *do all acts and execute in the name and on behalf of the company* all deeds, receipts and *other documents* and for that purpose use when necessary, the company's seal; (Emphasis added.).

(4) according to s 516(1) of the CA, when a company is wound up, the words 'in liquidation' shall be added after the name of the company in 'every' 'business letter issued by or on behalf of the company'. If the liquidator or officer of a wound-up company contravenes s 516(1) of the CA, the liquidator or officer would have committed an offence under s 516(2) of the CA which is punishable with a maximum fine of RM10,000. It is to be noted none of Zanwa's letter (11 July 2019), Zanwa's letter (14 August 2019), Zanwa's letter (26 September 2019), Zanwa's letter (10 October 2019) and Zanwa's letter (9 June 2020) (sent after Zanwa's winding up on 5 April 2019) complied with s 516(1) of the CA by stating that Zanwa was in liquidation;

(5) Zanwa's letter (11 July 2019) even proposed to 'assign' (should be novate) the 'balance works' under the contract (plaintiff-Zanwa) to a third party;

(6) Zanwa's email (19 November 2019) merely informed the plaintiff that Zanwa had stopped operations. Zanwa's email (19 November 2019) did not have the candour to inform the plaintiff that Zanwa had been wound up by the Kuala Lumpur HC; and

(7) Zanwa's letter (9 June 2020) stated that there was a 'rental dispute' between the first and second defendants. Such a statement was economical with the truth as the second defendant's summary judgment (Klang SC) had already been granted!

[64] The first defendant had concealed the following relevant facts from the plaintiff:

(1) tenancy agreement (first defendant-second defendant);

(2) second defendant's suit (Klang SC); and

(3) second defendant's summary judgment (Klang SC),

(first defendant's concealment).

[65] We are of the view that the learned HC judge has made a plain error of fact when His Lordship did not consider the following pertinent matters:

(1) due to Zanwa's concealment, Zanwa's deception and first defendant's concealment, the plaintiff could not have actual knowledge of all the relevant facts of this case;

(2) there was no evidence in this case to prove that the plaintiff was willfully blind to the relevant facts which were obvious; and

(3) the plaintiff was entitled to insist that Zanwa performed all obligations under the contract (plaintiff-Zanwa), especially when the plaintiff's payment (Zanwa) had already been made,

(fourth appealable error).

[66] We have not overlooked the first defendant's WhatsApp message (10 December 2019) (relied on by the learned HC judge in the GOJ). The first defendant's WhatsApp message (10 December 2019) only informed the plaintiff that the two power transformers had been seized and did not disclose all the relevant facts to the plaintiff which would disabuse the plaintiff from the plaintiff's erroneous impression of the then situation regarding the two power transformers (caused by Zanwa's concealment, Zanwa's deception and first defendant's concealment).

[67] In view of Zanwa's concealment, Zanwa's deception and first defendant's concealment, the learned HC judge should not have relied on the alleged plaintiff's inaction. Consequently, the learned HC judge erred in law and fact by deciding that this amended OS was barred by laches, acquiescence, waiver, estoppel and/or abandonment (fifth appealable error).

I(2). Whether the second defendant could rely on equitable estoppel doctrine

[68] With regard to the application of the equitable estoppel doctrine, by way of Puan Wan's affidavit the second defendant had been expressly informed of the plaintiff's equitable ownership (two power transformers) before the judicial auction (two power transformers). The second defendant did not however inquire from the plaintiff regarding the ownership of the two power transformers. Worse still, the second defendant proceeded with the judicial auction (two power transformers). Due to such an inequitable conduct on the part of the second defendant (*second defendant's inequitable conduct*), the learned HC judge should not have applied the equitable estoppel doctrine in this case (sixth appealable error).

I(3). The plaintiff's efforts to recover two power transformers

[69] After the plaintiff had been informed of the judicial auction (two power transformers) by way of Zanwa's letter (9 June 2020), the plaintiff had taken the following action over a period of less than two months (before filing this OS on 6 August 2020):

(1) the plaintiff had sent letters dated 17 June 2020 to the first defendant's solicitors and second defendant's solicitors which, among others, demanded for the return of two power transformers;

(2) time had to be taken to consider and appoint the plaintiff's solicitors to act in this case; and

(3) the plaintiff's solicitors had to:

(a) conduct file searches to ascertain the latest status of legal proceedings in second defendant's suit (Klang SC);

(b) gather evidence in support of this amended OS; and

(c) draft the cause papers in this amended OS,

('plaintiff's efforts').

The learned HC judge should have taken into account the plaintiff's efforts in deciding whether the plaintiff was barred by laches, acquiescence, waiver, estoppel and/or abandonment (seventh appealable error). In the HC case of *Ling Tiew Hoe v Public Finance Bhd* [1997] MLJU 256, Tee Ah Sing J (as he then was) held that a period of five months for a registered co-proprietor of one-fifth undivided share in land (interest (land)) to apply to court to set aside the sale of the interest (land) by public auction to a purchaser (on the ground that the co-proprietor had not been given notice of the public auction), was not a bar for the court to set aside the sale and subsequent registration of the interest (land) in favour of the purchaser.

J. COULD PLAINTIFF HAVE FILED INTERPLEADER PROCEEDINGS IN THIS CASE?

[70] According to the HC's judgment, the plaintiff should have filed interpleader proceedings. With respect, this constitutes an error of law on the part of the learned HC judge (eighth appealable error). Our reasons are as follows:

(1) O 17 rr 1(1) and 5(1) of the RC state as follows:

> O 17 r 1 Entitlement to relief by way of interpleader
>
> (1) Where —
>
> (a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto; or
>
> (b) *a claim is made to any money, goods or chattels taken or intended to be taken by the Sheriff in execution under any process, or to the proceeds or value of any such goods or chattels, by a person other than the person against whom the process is issued, the person under liability or, subject torule 2, the Sheriff may apply to the Court for relief by way of interpleader.*
>
> ...
>
> O 17 r 5 *powers of Court hearing originating summons or notice of application*
>
> (1) *Where on the hearing of the originating summons or a notice of application under this order all persons making the adverse claims to the subject matter in dispute ('claimants') appear, the Court may order —*
>
> (a) that any claimant be made a defendant in any action pending with respect to the subject matter in dispute in substitution for or in addition to the applicant for relief under this order; or
>
> (b) *that an issue between the claimants be stated and tried* and may direct which of the claimants is to be plaintiff and which is to be defendant. (Emphasis added.)

The nature and scope of interpleader proceedings have been explained by the FC in the following judgment delivered by Ahmad Maarop FCJ (as he then was) in *Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor* [2013] 4 MLJ 313; [2013] 5 CLJ 161, at paras [32], [34], [36] and [49]:

> *[32] In our view, the search for the answer to the leave question inevitably involves the consideration of the nature and object of the interpleader proceedings. Appreciation of the nature, object and purpose of the interpleader provisions would certainly assist in the determination of the court's jurisdiction in interpleader proceedings. The provisions relating to interpleader proceedings are housed in O 17 of the RHC. It is based on English practice. O 17 r 1 of the RHC which embodies the essence of interpleader application was taken from O 17 r 1 of the Rules of the Supreme Court 1965. ...*

A ...

[34] Order 17 r 1(a) of the RHC is the provision for what is known as stakeholder's interpleader. Under this provision a person who holds any money, goods or chattels which he does not claim, or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an B *action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong*. (Mallal's Supreme Court Practice, second edn, vol. 1, 1983). *The nature of an interpleader is lucidly explained in De La Rue v Hernu, Peron & Stockwell, Ltd. De La Rue, claimant* [1936] 2 All ER 411 ...

C ...

[36] *Apply the interpleader principles enunciated in De La Rue to the present appeal. In applying for the interpleader relief, the plaintiff was not bringing an action or making a claim against the first or the second defendants. In the face of what it took to be countervailing claims by the first and the second defendants, the plaintiff filed the* D *interpleader summons seeking assistance from the court — to get relief from the court and get it decided to whom it should account for the 18 document of titles.*

...

[49] ... *However, as we have explained elsewhere in this judgment, in applying for* E *interpleader summons, the plaintiff was not bringing an action or making a claim against the second or the first defendants. If there was no claim how could there be a counterclaim? More importantly, as we have said, an interpleader summons is a type of originating summons excepted under O 28 r 1 of the RHC from the originating summons procedure under O 28 of the RHC. The plaintiff came to the High Court* F *seeking for interpleader relief, seeking decision of the court as to whom he should account for the 18 documents of title. All that the court had to determine was whether or not it was necessary, for the purpose of assisting by means of interpleader, to make an order which would enable the plaintiff to know to whom he had to account for the documents of titles (applying De La Rue). For this purpose the interpleader summons called upon the first and the second defendants to come out and state their claims so that the court could* G *decide to whom the plaintiff should account for the documents of titles*. ... (Emphasis added.)

(2) in this amended OS, the plaintiff is not merely applying for the return of the two power transformers but the plaintiff has also claimed damages from the H defendants based on the following three causes of action:

(a) tort of conversion and tort of negligence against the first and second defendants; and

I (b) the third defendant had been unjustly enriched with regard to the two power transformers,

('plaintiff's three causes of action').

Premised on *Tetuan Teh Kim Teh, Salina & Co*, the plaintiff could not have filed interpleader proceedings in the second defendant's suit (Klang SC) because the

plaintiff's three causes of action have to be decided in a fresh action (as in this amended OS).

K. WHETHER THE COURT CAN ORDER RETURN OF TWO POWER TRANSFORMERS TO THE PLAINTIFF

[71] Section 9 of the SRA provides as follows:

> Section 9 Recovery of specific movable property.
>
> *A person entitled to the possession of specific movable property may recover the same in the manner prescribed by the law relating to civil procedure.* (Emphasis added.)

[72] Upon proof of the plaintiff's equitable ownership (two power transformers), we are of the view that the learned HC judge should have made a restitution order under s 9 of the SRA, ie, an order for the return of the two power transformers to the plaintiff (ninth appealable error). In *D&C Bank*'s case, at pp 318 and 321, the HC had ordered the return of movable properties to their rightful owner when these movable properties in the possession of EDr had been wrongfully seized by the ECr.

[73] Section 9 of the SRA provides for a statutory remedy. Accordingly, the plaintiff is not required to prove the plaintiff's three causes of action as a condition precedent for the HC to make a restitution order.

[74] As explained in the above paras 55, 57 and 58, the bailiff's seizure (two power transformers) and judicial auction (two power transformers) are invalid. Consequently:

(1) the third defendant could not have obtained any legal or equitable ownership of the two power transformers; and

(2) the restitution order should have been made in this case notwithstanding the fact that the third defendant was a bona fide purchaser of the two power transformers for valuable consideration without any actual notice of the plaintiff's equitable ownership (two power transformers).

L. SHOULD THE PLAINTIFF HAVE JOINED ZANWA AS A CO-DEFENDANT IN AMENDED OS?

[75] We reproduce below O 1A, O 2 r 1(2), O15 r 6(1), (2)(b)(i) and (ii) of the RC:

> O 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.*

A O 2 r 1(2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.*

O 15 r 6(1) *A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues* B *or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

Rule 6(2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —* C

...

(b) *order any of the following persons to be added as a party, namely —*

(i) *any person who ought to have been joined as a party or whose presence* D *before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

(ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected* E *with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter*. (Emphasis added.)

F **[76]** According to the learned HC judge, the plaintiff should have cited Zanwa as a co-defendant in this amended OS. With respect, we are of the view that the Klang HC has erred in this respect (tenth appealable error). Our decision is premised on the following evidence and reasons:

G (1) as explained in the above para 55, the plaintiff is the beneficial owner of the two power transformers. There is therefore no reason for the plaintiff to cite Zanwa as a co-defendant in this amended OS;

(3) even if Zanwa had applied to the Klang HC to be joined as a co-defendant H in this amended OS, such an application should not be allowed by the learned HC judge because in view of proof of the plaintiff's equitable ownership (two power transformers):

(a) it was not necessary to join Zanwa under O 15 r 6(2)(b)(i) of the RC as a party so as to ensure that all matters in dispute in the amended OS I could be completely determined; and

(b) with regard to the relief claimed by the plaintiff in this amended OS, Zanwa could not rely on O 15 r 6(2)(b)(ii) of the RC as there did not exist any question between Zanwa and any party in this amended OS for

which it would be just and convenient for the Klang HC to determine that question:

(i) between Zanwa and all the parties in this case; and

(ii) between the parties in the amended OS; and

(3) O 1A and O 2 r 1(2) of the RC require the court to apply RC with regard to the 'overriding interest of justice and not only to the technical non-compliance with' RC. According to O 15 r 6(1) of the RC, this amended OS 'shall not be defeated by reason of the … non-joinder' of Zanwa and the Klang HC may determine the issues in dispute so far as they affect the rights and interests of all the parties in this case.

M. SHOULD KLANG HC GRANT DECLARATIONS UNDER S 41 OF THE SRA?

[77] Section 41 of the SRA states as follows:

> Section 41 SRA *Discretion of court as to declaration of status or right*
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief*:
>
> *Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.* (Emphasis added.)

[78] The learned HC judge had refused to exercise His Lordship's discretion under s 41 of the SRA to make declarations in the plaintiff's favour due to the following reasons:

(1) the existence of the alleged plaintiff's inaction which led to the HC's application of laches, acquiescence, waiver, estoppel and/or abandonment in this case; and

(2) the proviso to s 41 of the SRA barred the plaintiff's application for declarations. This was because the plaintiff could have filed interpleader proceedings in the second defendant's suit (Klang SC) (and claimed for the return of the two power transformers) but the plaintiff had failed to do so.

[79] We are mindful that as a general rule, an appellate court should not intervene regarding the exercise of a judicial discretion by the court of first instance. Having said that, an appellate panel may set aside the lower court's exercise of discretion if, among others:

(1) the exercise of discretion is based on an error of law or if the court of first instance has taken into account an irrelevant consideration; and

(2) the error of law or the court's consideration of an irrelevant matter has led to an injustice which warrants appellate intervention

please refer to the judgment of Abdull Hamid Embong FCJ in the FC in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312, at para [48].

We are of the view that the learned HC judge has erroneously exercised His Lordship's discretion pursuant to s 41 of the SRA (eleventh appealable error) because:

(1) as explained in the above Parts I(1) to I(3), the alleged plaintiff's inaction did not exist. Accordingly, there is no room for the Klang HC to rely on laches, acquiescence, waiver, estoppel and/or abandonment in this case;

(2) the learned HC judge has committed an error of law in deciding that the plaintiff should have filed interpleader proceedings in the second defendant's suit (Klang SC) — please refer to the above Part J; and

(3) proviso to s 41 of the SRA only applies when a party merely applies for a declaratory order and nothing else. In addition to an application for declarations, this amended OS had also sought for the return of the two power transformers and damages for the plaintiff's three causes of action. In other words, the proviso to s 41 of the SRA cannot bar the court's grant of declarations in this amended OS.

N. SHOULD THE COURT ALLOW THE PLAINTIFF'S THREE CAUSES OF ACTION?

N(1). Whether the first and second defendants are liable for tort of negligence to the plaintiff

[80] We have no hesitation to decide that the first defendant is not liable to the plaintiff for the tort of negligence. This decision is supported by the following evidence and reasons:

(1) premised on the FC's judgment delivered by Zainun Ali FCJ in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008, the first defendant owed a duty of care to the plaintiff with regard to the two power transformers (*first defendant's duty of care (two power transformers)*). The first defendant's duty of care (two power transformers) arose because the first defendant had voluntarily assumed responsibility for the two power transformers on the land;

(2) there was no breach of the first defendant's duty of care (two power transformers) because the first defendant had requested the plaintiff to collect the two power transformers on the land in:

(a) first defendant's WhatsApp message (3 October 2019); and

(b) first defendant's WhatsApp message (10 December 2019);

(3) even if it was assumed that the first defendant's duty of care (two power transformers) had been breached, the plaintiff did not suffer any loss because Zanwa had failed to complete the contract (plaintiff-Zanwa) and the plaintiff could not have used the two power transformers in any event. Furthermore, in accordance with the general principle of *restitutio in integrum*, the restitution order made by this court (please refer to the above paras 72–74) would have placed the plaintiff in the same position as the plaintiff would have been in if the tort of negligence had not been committed by the first defendant.

[81] It is our decision that the second defendant could not be liable to the plaintiff for the tort of negligence as the second defendant owed no duty of care to the plaintiff in respect of the two power transformers. This was because there was no 'sufficient legal proximity' between the plaintiff and second defendant with regard to the two power transformers, namely, it was not reasonably foreseeable that the plaintiff would have suffered the loss of the two power transformers which would arise from the second defendant's conduct. Nor was there:

(1) physical proximity;

(2) circumstantial proximity; and

(3) causal proximity,

between the plaintiff and second defendant regarding the two power transformers.

N(2). Were the first and second defendants liable to the plaintiff for tort of conversion?

[82] The first question to be determined is whether proof of the plaintiff's equitable ownership (two power transformers) can confer a right to sue (conversion) on the plaintiff without the need for the plaintiff to prove a right to immediate possession (two power transformers). This is a case of first impression in Malaysia.

[83] To answer the above issue, we adopt the following judgment of Mummery LJ in United Kingdom's CA case of *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, at p 601:

> *In brief, the position is that an equitable owner had no title at common law to sue in conversion, unless he could also show that he had actual possession or an immediate right to possession of the goods claimed this substantive rule of law was not altered by the Supreme Court of Judicature Acts, which were intended to achieve procedural*

A *improvements in the administration of law and equity in all courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law, such as the rule that a plaintiff in an action for conversion must have possession or a right to immediate possession of the goods.* (Emphasis added.)

B Premised on *MCC Proceeds*, to sustain a claim for the tort of conversion:

(1) the plaintiff cannot rely on the plaintiff's equitable ownership (two power transformers); and

(2) the plaintiff is required to prove a right to immediate possession (two
C power transformers) when the judicial auction (two power transformers) was carried out.

[84] We will now consider whether the plaintiff has proven a right to immediate possession (two power transformers) on the date of the judicial
D auction (two power transformers).

[85] The learned HC judge had decided that as the plaintiff had no possession of the two power transformers at the material time, the plaintiff had no right to immediate possession (two power transformers). With respect, we
E are unable to agree because at the time of the judicial auction (two power transformers), the plaintiff had a right to immediate possession (two power transformers). Such a right is clear from Zanwa's letter (14 August 2019), Zanwa's letter (26 September 2019), the first defendant's WhatsApp message (3 October 2019), Zanwa's letter (10 October 2019), Zanwa's email
F (19 November 2019) and the first defendant's WhatsApp message (10 December 2019) which requested the plaintiff to collect the two power transformers from the land. Consequently, the plaintiff had the right to sue the first and second defendants for the tort of conversion regarding the two power transformers.
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[86] We unhesitatingly decide that by way of the bailiff's seizure and judicial auction (two power transformers), the second defendant had committed a tort of conversion of the two power transformers against the plaintiff (*second defendant's conversion (two power transformers)*). As the first defendant was not
H involved in the bailiff's seizure and judicial auction (two power transformers), the first defendant was not liable to the plaintiff for the tort of conversion in this case.

I **[87]** As explained in the above sub-para 80(3), notwithstanding the second defendant's conversion (two power transformers), this court will not award any damages to the plaintiff. This is because the plaintiff has not suffered any loss due to the second defendant's conversion (two power transformers) as:

(1) the plaintiff cannot use the two power transformers; and

(2) this court grants the restitution order which is an adequate remedy for the plaintiff in this case.

N(3). Whether the third defendant was unjustly enriched with regard to two power transformers

[88] According to Azahar Mohamed FCJ (as he then was) in the FC in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, at paras [110], [117] and [118], a plaintiff can rely on the equitable doctrine of unjust enrichment against a defendant if the following four conditions are proven by the plaintiff against the defendant:

(1) the defendant has been enriched;

(2) the defendant's enrichment has been gained at the plaintiff's expense;

(3) the defendant's retention of the benefit is unjust; and

(4) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution to the plaintiff.

[89] In this case, the plaintiff's unjust enrichment claim against the third defendant cannot succeed because the third defendant had not been enriched in respect of two power transformers. On the contrary, the third defendant had purchased the two power transformers at the judicial auction (two power transformers) and paid the sale proceeds (auction) for, among others, the two power transformers. Furthermore, the third defendant's loss has been incurred and is still being incurred!

N(4). Should court allow the plaintiff's three causes of action?

[90] As explained in the above Parts N(1) to N(3), there is no basis for the plaintiff's three causes of action.

O. CAN THE SECOND DEFENDANT RELY ON ALLEGED FRAUDULENT SCHEME?

[91] In *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30, at pp 31–32, Syed Agil Barakbah SCJ has delivered the following judgment of the SC:

> Now, *the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, viz (a) facts judicially noticed* and (b) facts admitted. The exceptions are dealt with by ss 56, 57 and 58 of the EA under the title 'facts which need not be proved.' *In so far as judicial notice is concerned, the provisions of s 57(1) makes it mandatory for the court to take judicial notice of all laws and regulations having the force of law, public Acts passed by*

A *Parliament, the course of parliamentary proceedings and other matters that are enumerated in sub-s (1)(a)–(o) of the section. The list however is not exhaustive since it is impossible to make a really complete list although a long list of facts which the English courts take judicial notice has been prepared. The important point to note is that s 57 does not prohibit the courts from taking judicial notice of other facts not mentioned*
B *therein. The matter which the court will take judicial notice must be the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof.* (Emphasis added.)

C As decided in *Pembangunan Maha Murni*, the court can only take judicial notice of the following two categories of matters:

(1) a matter which falls under any one of the paras in s 57(1)(a)–(o) of the EA; and

D (2) if a matter is not one which is stated in s 57(1)(a)–(o) of the EA, the court may still take judicial notice of the matter if the matter fulfils the following two conditions cumulatively:

E (a) the matter is 'subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention'; and

(b) the matter 'must be so sufficiently notorious' for which the court may assume the existence of the matter without proof, ('two
F conditions (judicial notice)').

[92] Firstly, the court cannot take judicial notice of the alleged fraudulent scheme because the two conditions (judicial notice) have not been fulfilled by the second defendant with regard to the alleged fraudulent scheme.

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[93] Secondly, there is no evidence adduced by the second defendant in this case to prove the alleged fraudulent scheme.

[94] Lastly, even if it is assumed that there was evidence to prove the alleged
H fraudulent scheme, the plaintiff was neither party nor privy to the alleged fraudulent scheme. As such, the alleged fraudulent scheme could not defeat the plaintiff's equitable ownership (two power transformers) and this appeal. In other words, the Klang HC's decision cannot be justified on the alleged fraudulent scheme.

I

P. HOW TO COMPENSATE THE THIRD DEFENDANT'S LOSS?

[95] We acknowledge that the third defendant's loss has occurred due to our decision in this appeal. As the second defendant has committed an abuse of

court process regarding the judicial auction (two power transformers), the third defendant has a right to claim from the second defendant for the third defendant's loss based on the tort of abuse of court process — please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the CA case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ 340, at pp 352–356.

Q. SUI GENERIS NATURE OF THIS CASE

[96] The following facts in this appeal distinguish all the cases relied on by the HC and learned counsel for the defendants:

(1) the plaintiff's equitable ownership (two power transformers);

(2) Zanwa's concealment;

(3) Zanwa's deception;

(4) the first defendant's concealment;

(5) the second defendant's inequitable conduct; and

(6) the plaintiff's efforts.

R. GUIDELINES

[97] We take this opportunity to propose the following guidelines in the event that there is a claim for a movable property seized by an ECr pursuant to a WSS and its subsequent sale by way of a judicial auction (guidelines):

(1) before ECr seizes movable property pursuant to a WSS:

(a) if ECr has actual knowledge that a third party (third party) is the equitable owner of the movable property, the ECr should not seize the movable property under the WSS;

(b) if ECr has been given notice by EDr, third party or any other party that a third party is the beneficial owner of the movable property, the ECr should then inquire in writing from the third party regarding the equitable ownership of the movable property (ECr's written inquiry (third party)); and

if the third party responds to ECr's written inquiry (third party) with a claim for the return of the movable property (third party's claim (return of movable property)):

(i) if ECR accepts the third party's claim (return of movable property), the movable property should not be seized pursuant to the WSS;

(ii) if the third party's claim (return of movable property) is not

accepted by ECr, it may not be prudent for the ECr to seize the movable property under the WSS. Instead, the ECr should notify the Sheriff of the third party's claim (return of movable property) so as to enable the Sheriff to institute interpleader proceedings in the court which has issued the WSS (execution court) pursuant to O 17 r 1(1)(b) of the RC (*a claim is made to* any money, *goods or chattels … or intended to be taken by the Sheriff in execution under any process*) (Emphasis added.).

The execution court will conduct the interpleader proceedings and decide on the third party's claim (return of movable property) (*execution court's decision*). In this respect, the execution court should apply the legal and evidential burden as explained in the above para 53. Upon the making of the execution court's decision, ECr, EDr and/or third party may thereafter appeal to a higher court against the execution court's decision; and

(iii) if the third party intends to file a claim for damages based on the tort of conversion of the movable property (third party's claim (damages)), in accordance with the FC's decision in *Tetuan Teh Kim Teh, Salina & Co*, the third party has to file a fresh suit in respect of the third party's claim (damages) (*third party's new suit*). When there is a third party's claim (damages) and a subsequent third party's new suit, the interpleader proceedings is an exercise in futility. If interpleader proceedings are instituted and completed when there is a third party's claim (damages):

(iii)(a) limited judicial resources are not optimally utilised; and

(iii)(b) there will be a waste of costs, time and effort on the part of all parties,

with regard to the interpleader proceedings;

(2) after seizure of movable property under a WSS but before the completion of a judicial auction:

(a) if ECr has actual knowledge that a third party is the equitable owner of the movable property, the ECr should exclude the movable property from the judicial auction and return the movable property to the third party;

(b) if ECr has been given notice by EDr, third party or any other party that the third party is the beneficial owner of the movable property, as a matter of prudence, ECr's written inquiry (third party) should have been made;

(c) if a third party's claim (return of movable property) is made:

(i) if the third party's claim (return of movable property) is accepted by ECR, despite the seizure of the movable property pursuant to WSS, it is advisable for the ECr to return the movable property to the third party; or

(ii) if ECr disputes the third party's claim (return of movable property), the ECr should not proceed with the judicial auction. Instead, the ECR should notify the Sheriff of the third party's claim (return of movable property) and this will then enable the Sheriff to institute interpleader proceedings in the execution court. In such a situation, the execution court can decide on the third party's claim (return of movable property) and all parties may thereafter appeal to a higher court against the execution court's decision; and

(d) when there is a third party's claim (damages), in anticipation of the third party's new suit, interpleader proceedings should not be instituted — please refer to the above sub-para (1)(b)(iii); and

(3) if movable property has been sold by way of a judicial auction to a purchaser (purchaser) —

(a) a third party's claim (return of movable property) and/or third party's claim (damages) can only be resolved by way of a third party's new suit (as in this case). Needless to say, ECr, EDr and purchaser should be cited as co-defendants in the third party's new suit; and

(b) as explained in the above sub-para (1)(b)(iii), interpleader proceedings should not have been filed.

[98] An adoption of the guidelines has the following advantages:

(1) if —

(a) ECr's written inquiry (third party) is made;

(b) there is a third party's claim (return of movable property) in reply to ECr's written inquiry (third party); and

(c) ECr accepts the third party's claim (return of movable property)

that will be the end of the third party's claim (return of movable property). In this manner, there will be a saving of —

(i) valuable judicial resources; and

(ii) time, effort and expense of all parties;

(2) if —

(a) ECr's written inquiry (third party) has been made;

(b) there is a third party's claim (return of movable property) in response to ECr's written inquiry (third party); and

(c) ECr does not accept the third party's claim (return of movable property).

Interpleader proceedings can be expeditiously commenced and the execution court may then decide on the third party's claim (return of movable property) without any undue delay;

(3) if there is a third party's claim (damages) and/or third party's new suit, interpleader proceedings should not have been filed and —

(a) this will ensure an optimum use of precious judicial resources; and

(b) ECrs, EDrs and claimants will not have to waste time, effort and cost to conduct interpleader proceedings; and

(4) if ECr's written inquiry (third party) is made and if the third party is indeed the equitable owner of movable property, ECr may avoid liability —

(a) to third party for costs of third party's successful recovery of movable property from ECr (as in this case);

(b) to third party for damages with regard to ECr's commission of tort of conversion by way of ECr's wrongful seizure and sale of movable property to the purchaser at the judicial auction; and

(c) to purchaser for damages for ECr's tort of abuse of court process in respect of ECr's wrongful sale of movable property to the purchaser at the judicial auction.

S. OUTCOME OF THIS APPEAL

[99] Premised on the first to eleventh appealable errors, this appeal is allowed with the following orders:

(1) Klang HC's decision is set aside;

(2) the amended OS is allowed as follows:

(a) the following declarations are granted:

(i) the plaintiff is the lawful and beneficial owner of the two power transformers;

(ii) the bailiff's seizure (two power transformers) and judicial auction (two power transformers) are invalid and void; and

(iii) any interest in the two power transformers obtained by the third defendant in the judicial auction (two power transformers) is unlawful and is hereby set aside;

(b) an order for the defendants to return the two power transformers to the plaintiff within seven days from the date of this court's order and the cost of this return shall be borne solely by the plaintiff;

(c) the money in the client's account of the second defendant's solicitors (this bank account was held by the second defendant's solicitors as trustees for the third defendant's payment of the sale proceeds (auction) with regard to the two power transformers) shall be returned forthwith to the third defendant; and

(d) all court fees and commission paid by the third defendant with regard to the judicial auction (two power transformers) shall be refunded to the third defendant.

(3) subject to allocatur fee, costs of RM30,000 for this appeal and amended OS shall be paid by the second defendant to the plaintiff; and

(4) no order as to costs is made against the first and third defendants because the first and third defendants were not involved in the bailiff's seizure (two power transformers) and judicial auction (two power transformers).

[100] This judgment sends a clear message that any execution creditor who has been informed that movable property in the possession of an execution debtor may belong in equity to a third party, should inquire from the third party before seizing and selling the movable property pursuant to a WSS. If otherwise, such an execution creditor may face adverse legal consequences if the third party is able to prove the third party's equitable ownership of the movable property on a balance of probabilities (as has happened in this case).

Appeal allowed with costs of RM30,000 to be paid by second defendant to plaintiff.

Reported by Dzulqarnain Ab Fatar